86 1828

No. 86-_____

Supreme Court, U.S.
FILED
MAY 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

F. GEORGE ALBERTUS, *et al.*,
Appellants

v.

STATE TAX COMMISSION OF MISSOURI, *et al.*,
Appellees

On Appeal From The Supreme Court Of Missouri

JURISDICTIONAL STATEMENT

LAWRENCE G. CRAHAN
Counsel of Record
DONALD U. BEIMDIEK
THOMAS B. WEAVER
JORDAN B. CHERRICK

ARMSTRONG, TEASDALE, KRAMER,
VAUGHAN & SCHLAFLY
611 Olive Street, Suite 1900
St. Louis, Missouri 63101
(314) 621-5070
Counsel for Appellants

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTION PRESENTED

By constitutional amendment, the citizens of Missouri established three subclassifications of real property for purposes of assessment of property taxes: (1) Residential property; (2) Agricultural property; and (3) Utility, industrial, commercial and railroad property ("commercial property"). The same amendment also permitted the property in the three subclasses to be defined by law. Pursuant to such authority, the legislature defined "residential property" as "all real property improved by a structure which is used or intended to be used for residential living by human occupants *and which contains not more than four dwelling units* or which contains single dwelling units owned as a condominium or in a cooperative housing association." (emphasis added).

The question presented is:

Whether a legislative classification of structures containing four or fewer dwelling units as "residential" and five or more dwelling units as "commerical" violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution because it is palpably arbitrary and not rationally related to any conceivable legitimate state objective that might be served by a constitutional amendment permitting classification of real property as "residential" or "commercial."

COMPLETE LISTING OF PARTIES

Appellants:

F. George Albertus
Loretta S. Kernebeck
Irving C. Rubin
Paul Koch

Appellees

State of Missouri
State Tax Commission of Missouri
Ralph N. Smith, Chairman,
Van E. Donley, Member
Robert E. Coleman, Member
Associated Industries of Missouri
Keith E. and Carol S. Mattern
Kenneth D. and Judy E. Ramsey
Robert E. and Dorothy J. Lueders
Wayne D. and Fredreka Ortloff
Glenn W. and Blanche B. Stahl
Centrifugal and Mechanical Industries, Inc.
The Hesse Corporation
Missouri Merchants and Manufacturers Association

The foregoing listing includes all parties in the proceeding below. The Missouri School Boards Association also participated as *amicus curiae* in the Missouri Supreme Court by leave of that court.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND RULES	2
HOW THE FEDERAL QUESTION WAS RAISED	3
STATEMENT OF THE CASE	3
THE QUESTION IS SUBSTANTIAL	6
I. This Court Has Previously Assured Missourians That They May Seek Appellate Review Of State Court Decisions Denying Federal Constitutional Challenges To Missouri's Tax System.	6
II. The Missouri Supreme Court Failed To Apply The Constitutional Standards Consistently Mandated By The Decisions Of This Court.	8
III. The Statutory Classification Based On The Number Of Dwelling Units Bears No Rational Relationship To Any Legitimate State Interest That Might Be Advanced By The Residential/Commercial Classification Scheme Established By The Amendments To The State Constitution.	11
IV. The Statutory Distinction Between Four And Five Unit Buildings Does Not Foster Home Ownership As Suggested By The State Because It Would Only Discourage Home Ownership By Minorities And The Economically Disadvantaged.	15
V. The Rationale Suggested By The State Is Inconsistent With The Statutory Provision It Is Seeking To Defend.	18
VI. Principles Of Federalism Require Thorough Appellate Review By This Court.	19
CONCLUSION	20
APPENDIX	1a

TABLE OF AUTHORITIES

Page

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment XIV... 1, 2, 3, 5, 6

Missouri Constitution:

Article X, § 4(b)..... *passim*

Article X, § 6..... 2, 14, 15, 17

CASES

Allied Stores v. *Bowers*, 358 U.S. 522 (1959)..... 8, 19

City of Cleburne, Tex. v. *Cleburne Living Center*, 473 U.S. 432 (1985)..... 8

Fair Assessment in Real Estate v. *McNary*, 454 U.S. 100 (1981)..... 7, 19

Great Lakes Dredge & Dry Dock Co. v. *Huffman*, 319 U.S. 293 (1943)..... 7

Greenholtz v. *Nebraska Penal Inmates*, 442 U.S. 1 (1979) 19

Hooper v. *Bernalillo County Assessor*, 472 U.S. 612 (1985)..... 8

Metropolitan Life Ins. Co. v. *Ward*, 470 U.S. 869 (1985) 8

Shepherd v. *State*, 427 S.W.2d 382 (Mo. 1968)..... 9, 13

Wheeling Steel Corp v. *Glander*, 337 U.S. 562 (1949) ... 19

STATUTORY PROVISIONS

Revised Statues of Missouri (1986):

§ 137.016.1..... *passim*

§ 137.115.5..... 2, 5

SECONDARY AUTHORITIES

U.S. Department of Commerce, Bureau of Census, 1980 Census of Housing, General Housing Characteristics, Missouri..... 16

U.S. Department of Commerce, Bureau of Census, 1980 Census of Housing, Detailed Housing Characteristics, Missouri..... 16, 17, 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-_____

F. GEORGE ALBERTUS, *et al.*,

Appellants

v.

STATE TAX COMMISSION OF MISSOURI, *et al.*,

Appellees

On Appeal From The Supreme Court Of Missouri

JURISDICTIONAL STATEMENT

F. George Albertus, et al., Appellants, appeal from the final judgment of the Supreme Court of Missouri, dated January 8, 1987, holding that § 137.016.1(1) of the Revised Statutes of Missouri is not unconstitutional as violative of Appellants' rights to due process and equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States.

OPINIONS BELOW

The opinion of the Supreme Court of Missouri, which appears in the Appendix hereto, p. 1a, *infra*, is reported at 722 S.W.2d 916 (Mo. 1987) *(en banc)*.

The findings of fact and conclusions of law of the Circuit Court of Cole County, Missouri, dated September 12, 1986, are not reported. They are reprinted in the Appendix hereto, p. 39a, *infra*.

JURISDICTION

The opinion and judgment of the Supreme Court of Missouri, reversing the judgment of the Circuit Court of Cole County. Missouri, and upholding the constitutionality of Mo. Rev. Stat. § 137.016.1(1) (1986), were entered on January 8, 1987. See p. 32a, *infra*. Appellants' motion for rehearing was denied on February 17, 1987. See p. 34a, *infra*.

On March 13, 1987, the Supreme Court of Missouri entered an order staying enforcement of its judgment pending appeal to this Court. See p. 35a, *infra*.

Appellants' notice of appeal to this Court was timely filed in the Supreme Court of Missouri on March 12, 1987. See p. 36a, *infra*.

This appeal is being docketed in this Court within 90 days from the denial of rehearing below. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES

Because of their length, the text of following constitutional provisions and statutes involved in this case is set forth in the Appendix as provided in Rule 15.1.(f):
Fourteenth Amendment, United States Constitution (p. 49a).
Article X, Section 4(b), Missouri Constitution (p. 49a).
Article X, Section 6, Missouri Constitution (p. 49a).
§ 137.016.1, Revised Statutes of Missouri (1986) (p. 51a).
§ 137.115.5, Revised Statutes of Missouri (1986) (p. 51a).

HOW THE FEDERAL QUESTION WAS RAISED

In their original petition commencing this action, Appellants sought a declaration that § 137.016 of the Revised Statutes of Missouri violates the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Circuit Court of Cole County, Missouri, held that the distinction in § 137.016 between property containing four or fewer dwelling units and property containing more than four dwelling units is palpably arbitrary and not rationally related to any purpose of the law in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. See p. 46a, *infra*.

On appeal to the Supreme Court of Missouri, Appellants defended the judgment of the trial court that § 137.016 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. See opinion below, p. 3a, *infra*. The Missouri Supreme Court reversed the judgment of the trial court and remanded the case for entry of a declaratory judgment sustaining the validity of the statute. See opinion below, p. 6a, *infra*. It thus considered and expressly rejected Appellants' federal constitutional claims.

STATEMENT OF THE CASE

In 1982, the people of Missouri approved an amendment to article X, § 4(b) of the state constitution which would permit limited subclassification of real property in a forthcoming general reassessment. Insofar as is pertinent to this appeal, the amendment provided:

> Property in class 1 [real property] shall be subclassed in the following classifications:

> (1) Residential property;
>
> (2) Agricultural and horticultural property;
>
> (3) Utility, industrial, commercial, railroad and all other property not included in subclasses (1) and (2) of class I.
>
> Property in the subclasses of class 1 may be defined by law, however subclasses (1), (2) and (3) shall not be further divided . . .

Mo. Const. art. X, § 4(b) (proposed by Mo. Laws 1982, p. 734; adopted at special election of August 3, 1982).

Pursuant to the authority to "define" the subclasses of property established in article X, § 4(b), the legislature subsequently enacted § 137.016.1.(1), which initially provided in part:

> 1. As used in section 4(b) of article X of the Missouri Constitution, the following terms mean:
>
> (1) "Residential property", all real property improved by a structure which is used or intended to be used for residential living by human occupants *and which contains not more than four dwelling units* or which contains single dwelling units owned as a condominium or in a cooperative housing association. . . .

Mo. Laws 1983, p. 433; Mo. Rev. Stat. § 137.016.1.(1) (1986) (emphasis added).

This provision was amended in 1986 by adding a provision that "vacant land in connection with an airport, and land used as a golf course shall be classified as residential property." Mo. Rev. Stat. § 137.016.1.(1) (1986). Section 137.016.1.(3) provides that all property not included in the property listed in subclasses (1) [residential] and (2) [agricultural] as defined in § 137.016 shall be deemed to be included in the term "utility, industrial, commerical and

railroad property," (hereinafter referred to as "commercial property"). Mo. Rev. Stat. § 137.016.1.(3) (1986).

In 1985, the Missouri legislature fixed the percentages of true value at which each subclassification of real property would be assessed for tax purposes. Mo. Rev. Stat. § 137.115.5 (1986). These percentages are:

(1) Subclass (1) [residential] - 19%

(2) Subclass (2) [agricultural] - 12%

(3) Subclass (3) [commercial] - 32%

On May 5, 1985, Appellants F. George Albertus, et al., filed this action in the Circuit Court of Cole County, Missouri, seeking a declaration that § 137.016, or the language "and which contains not more than four dwelling units," is unconstitutional and void. Appellants' petition alleged, *inter alia*, that the statute's arbitrary classification violated the Due Process and Equal Protection clauses of the Fourteenth Amendment.

Appellants are (1) a resident of the City of St. Louis who owns a building containing six dwelling units, one of which is his residence, (2) a resident of Johnson County, Kansas, who owns twenty-six units of rental property in Jackson County, Missouri, (3) a resident of St. Louis County who is a lessee in an apartment complex containing more than four dwelling units and is obligated under the lease to pay a proportionate share of any tax increases, and (4) a general partner in a Missouri limited partnership which owns 147 units in the City of St. Louis.

All parties stipulated that there were no factual issues in dispute and that the case could be heard on motions for summary judgment. On September 12, 1986, the trial court issued its Findings of Fact, Conclusions of Law and Judgment. The trial court held that the distinction drawn

in § 137.016 between property containing four or fewer dwelling units and more than four dwelling units is not "reasonably related to any purpose of the law" and is "palpably arbitrary." See pp. 45a, 46a, *infra*. Thus, the trial court held, *inter alia*, that § 137.016 violates both the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Determining that the words "and which contains more than four dwelling units" are severable, the trial court ordered such language severed from the statute and entered judgment for Appellants. See p. 47a, *infra*.

On appeal, the Missouri Supreme Court reversed by a vote of four to three. Without articulating what legitimate state purpose might be served by the constitutional classification emodied in article X, § 4(b) or how the legislative distinction between four and five dwelling units would conceivably advance that purpose, the Court merely concluded that it was "unable to state that the legislature's choice lacked any rational basis." See opinion below, p. 5a, *infra*. Thus, the Court rejected Appellants' federal constitutional claims. One of the three dissenting judges expressly invited review of this holding by this Court. See opinion below, p. 30a, *infra*. (Welliver, J., dissenting).

By its order dated March 13, 1987, the Missouri Supreme Court stayed enforcement of its judgment pending appeal to this Court. See p. 35a, *infra*.

THE QUESTION IS SUBSTANTIAL

I. This Court Has Previously Assured Missourians That They May Seek Appellate Review Of State Court Decisions Denying Federal Constitutional Challenges To Missouri's Tax System.

The decade long struggle of Missourians to obtain equitable assessment and enforcement of real property taxes

is a subject already familiar to this Court. A partial history is recited in *Fair Assessment in Real Estate* v. *McNary*, 454 U.S. 100 (1981) (Rehnquist, J.), in which this Court held that the Missouri taxpayers who brought the case were barred by the principle of comity from asserting in federal court § 1983 actions against the validity of state tax systems.[1] Instead, the Court held that, "[s]uch taxpayers must seek protection of their federal rights by state remedies . . . *and may ultimately seek review of the state decisions in this Court.*" 454 U.S. at 116 (emphasis added). In light of the superficial treatment of Appellants' federal due process and equal protection claims by the Missouri Supreme Court, Appellants now seek fulfillment of this Court's promise of federal review.

In this case, the Missouri Supreme Court overturned the judgment of the trial court and dismissed Appellants' federal constitutional claims without even referring to the well-established criteria prescribed by this Court for analysis of equal protection and due process claims. Thus, coupled with this Court's previous holding in *Fair Assessment in Real Estate* v. *McNary* and *Great Lakes Dredge & Dock Co.* v. *Huffman, supra*, the Missouri Supreme Court's opinion would effectively negate every citizen's federal right to due process and equal protection of the laws in the area of state taxation. If there is no access to federal court and if state courts may properly deny federal constitutional claims by means of conclusory pronouncements rendered without undertaking the analysis mandated by the decisions of this Court, the rights guar-

---

[1] The Court also reaffirmed that taxpayers may not pursue injunctions or declaratory relief in federal court by virtue of 28 U.S.C. § 1341 and *Great Lakes Dredge & Dock Co* v. *Huffman*, 319 U.S. 293 (1943), respectively. *Fair Assessment in Real Estate, supra*, at 103, 110-11.

anteed by the federal constitution will become worthless for lack of a remedy.

II. The Missouri Supreme Court Failed To Apply The Constitutional Standards Consistently Mandated By The Decisions Of This Court.

If a classification does not involve fundamental personal rights or suspect distinctions such as race, religion or alienage,[2] this Court has uniformly held that the classification will be upheld if it is rationally related to a legitimate state interest. *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612 (1985); *see also Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869, 105 S.Ct. 1676, 1685 (1985) (O'Connor, J., dissenting) This is a two step inquiry. The first step requires identification of what was or may have been the State's interest to be advanced by the classification and a determination of whether that interest is "legitimate." The second step requires a determination of whether the classification established by the legislation is rationally related to the State's legitimate interest. *Hooper* v. *Bernalillo County Assessor, supra; Metropolitan Life Ins. Co.* v. *Ward, supra; City of Cleburne, Tex.* v. *Cleburne Living Center*, 473 U.S. 432 (1985); *Allied Stores* v. *Bowers*, 358 U.S. 522 (1959).

The majority opinion of the Missouri Supreme Court completely ignored the two step inquiry mandated by the prior decisions of this Court. The opinion never articulates any state interest to be served by the legislative distinction between four or fewer and five or more rental

---

[2] Although this case was not tried on a theory of racial discrimination, there is ample data which suggests that imposition of substantially higher property taxes on structures containing five or more dwelling units will have a disproportionate impact on minorities and the economically disadvantaged. See pp. 15-18, *infra*.

units and never determines whether such purpose is "legitimate." More importantly, nowhere in its opinion does the court make any attempt to determine what objectives the people of Missouri sought to achieve in amending article X, § 4(b) to establish separate subclassifications for residential, agricultural and commercial property. Inasmuch as the legislature's authority to enact § 137.016.1.(1) "defining" residential property is derived from article X, § 4(b), only those interests Missourians sought to advance by adopting article X, § 4(b) can be considered "legitimate" state interests for § 137.016.1. Thus, unless the legislative distinction between four and five rental units is rationally related to *those* interests, it cannot be sustained under the Equal Protection and Due Process Clauses of the fourteenth amendment.

Detailed examination of the Missouri Supreme Court's superficial analysis of Appellants' federal constitutional claims confirms the court's failure to recognize or apply the principles established by this Court.

The court states that rental housing has both residential and commercial aspects and suggests that the legislature might appropriately conclude that the commercial aspect predominates for buildings containing numerous units, whereas those containing only a few units have a predominately residential character. See opinion below, p. 4a, *infra*. However, as Judge Welliver pointed out in dissent, the term "residential," which was not defined by the majority, is ordinarily defined as a place of dwelling, abode or occupancy. See opinion below, p. 29a, *infra*. (Welliver, J., dissenting). Indeed, the Missouri Supreme Court has previously adopted this definition. *Shepherd* v. *State*, 427 S.W.2d 382 (Mo. 1968). Obviously, the degree to which rental units are used as a place of dwelling, abode or

occupancy does not vary with the number of units in the structure. A three or four unit structure is no more or less a place of dwelling, abode or occupancy, and thus no more or less "residential," than a five unit or a fifty unit structure. See opinion below, p. 22a, *infra*. (Rendlen, J., dissenting).

The court further suggests that the legislature might conclude that the selection of a definite figure, such as four, offered the most effective means of classifying rental property into residential and commercial categories. See opinion below, p. 5a, *infra*. Presumably, any arbitrary basis that might have been selected by the legislature, such as the height of the structure or number of trees on the property, would represent what the legislature thought was the most "effective" means of classifying the property into residential and commercial categories. Arbitrary classifications are nearly always "effective," but this has never been the test to determine whether they are constitutional. The essential question that the Missouri Supreme Court never asked is whether the means of classification selected bears some rational relationship to the purpose of classifying property as residential or commercial in the first place. Because the degree to which a structure is residential does not vary with the number of apartment units it contains, classification of property as residential or commercial based on the number of units is not rationally related to the purpose of the statute.

Finally, the court observes that the legislature might have been reluctant to burden the owner of a small complex with commercial taxes, which necessarily will be passed on to the tenants, whereas "[l]arger units . . . might be expected to bear the commercial rate." See opinion below, p. 5a, *infra*. Responding to Judge Wel

liver's dissent, however, the court concedes that the taxes will likely be passed on to tenants of larger units as well. See opinion below, p. 6a, *infra*. Thus, the impact on tenants cannot be considered a rational basis for distinguishing between structures containing four or fewer and five or more rental units.

On the basis of this reasoning, which is substantially contained in but a single paragraph of the court's opinion, the majority held that "[w]e are unable to say that the legislature's choice lacked any rational basis." See opinion below, p. 5a, *infra*. This does not satisfy the standards of equal protection and due process consistently required by this Court.

III. The Statutory Classification Based On The Number Of Dwelling Units Bears No Rational Relationship To Any Legitimate State Interest That Might Be Advanced By The Residential/Commercial Classification Scheme Established By The Amendments To The State Constitution.

The most fundamental flaw in the Missouri Supreme Court's analysis is the failure to examine whether the legislative distinction between four unit and five unit multi-family residence buildings is rationally related to whatever interests the people of Missouri sought to advance by distinguishing between residential and commercial property for tax purposes. Inasmuch as the legislature's authority to define residential property is derived solely from the amendment to article X, § 4(b), its purpose can be considered "legitimate" only to the extent it coincides with the purpose underlying that amendment. A contrary holding would mean that the legislature is free to dupe the citizenry into amending the constitution to accomplish one purpose and then use the included authority to adopt enabling legislation to accomplish any

purpose it sees fit. Such arbitrary action is plainly barred by even the most restrictive notion of due process.

To determine the purpose of the amendment to article X, § 4(b), it is essential to recognize that it, too, establishes a classification, differentiating among residential, commercial and agricultural property. Thus, if the amendment itself is to satisfy the requirements of the Equal Protection Clause, the people of Missouri must have had a legitimate state objective and the classifications established must be rationally related to that objective.

In the absence of any determination by the Missouri Supreme Court of the purpose of article X, § 4(b), it is impossible to state definitively what the people of Missouri hoped to accomplish by differentiating among residential, commercial and agricultural property for assessment of real property tax. However, it is possible to identify one likely purpose and to eliminate the rationale which has been suggested by the State.

The most likely legitimate state purpose for differentiating among residential, commercial and agricultural property is to recognize inherent differences in the manner in which real property taxes imposed on these classes of property are ultimately borne by the public. Taxes on residential property operate much like a per capita or "head" tax on each household. They are ultimately borne by those occupying the dwelling. Because everyone must have a dwelling of some sort, these taxes apply to everyone regardless of their income or level of consumption. In contrast, taxes on commercial and agricultural property operate more like a tax on consumption of goods and services. In general, these taxes are passed along to consumers as part of the overhead component of the price

of goods and services. Thus, the ultimate burden of such taxes falls most heavily on those who consume the most.

It is entirely appropriate for the citizens of a state to choose to moderate taxes on residential and agricultural property in an effort to ensure that the basic necessities of housing and food remain affordable for everyone. Other more discretionary items may properly be expected to reflect a greater tax burden to be borne primarily by those of greater means. Thus, a policy of minimizing the tax burden on basic necessities is a legitimate state purpose and classification of real property as residential, commercial or agricultural is rationally related to that purpose.

Substantial support for the view that Missourians intended to lessen the tax burden on all property used as a dwelling, including multi-family residence buildings of whatever size, is found in the plain and ordinary meaning of the term "residential" as reflected in the previous construction of the term by the Missouri Supreme Court. In *Shepherd* v. *State*, 427 S.W.2d 382 (Mo. 1968), the court quoted with approval authority from other states to the effect that:

> It is not necessary that we go to a dictionary or a law book to ascertain the meaning of "a residential building." Giving the words their *plain and ordinary meaning*, we would say that such a building is one used for residential purposes—that is, *one in which people reside or dwell*, or in which they make their homes, as *distinguished from one which is used for commercial or business purposes*.

427 S.W.2d at 388 (emphasis added). Declaring that the term "residential purposes" is not ambiguous, the court expressly held in *Shepherd* that it includes the use of land

for apartment buildings and multi-family residences. 428 S.W.2d at 390.

Additional persuasive, if not conclusive, authority confirming the people's intent to include all dwellings within the term "residential" is found in the simultaneous adoption of an amendment to article X, § 6. By that amendment, the people of Missouri repealed the previous personal property tax on merchants and manufacturers and substituted a new real property tax in the form of a surcharge on property in the "commercial" subclass established by the amendment to article X, § 4(b). The new surcharge is designed to produce exactly the same amount of revenue as the previous personal property tax. Mo. Const. art. X, § 6.

The specific requirement to produce the exact same revenue and the imposition of the new tax only upon "commercial" property are highly indicative of an intent to reimpose the same tax on approximately the same class that previously paid the merchants and manufacturers tax. This class never included multi-family residence buildings of any size.

Imposition of the new surcharge only upon true "commercial" property would comport with the manner in which taxes on different classes of property are ultimately borne by the public. The previous merchants and manufacturers license taxes and the new surcharge, if applied only to true "commercial" property, would operate much like a sales or consumption tax. However, imposition of the new surcharge on multi-family residential property of whatever size would ultimately be borne solely by the tenants. This would be inconsistent with the manifest intention to change the form but not the burden of the former merchants and manufacturers tax. Thus, the

simultaneous amendments of article X, § 4(b) and § 6 support the view that multi-family residence buildings were not intended to be classified as commercial property.

If the purpose of the constitutional classification of real property in article X, § 4(b) was to minimize the tax burden on food and housing, the legislative classification in § 137.016.1.(1) of structures containing four units or less as "residential" and five units or more as "commercial" cannot be sustained unless it is rationally related to *that* purpose. Absent article X, § 4(b), the legislature would have no authority to classify any real property for any purpose. Thus, only insofar as it advances the purpose for which the legislature was granted authority to "define" residential property can the legislature's purpose be considered "legitimate."

The distinction between four unit and five unit buildings is not rationally related to a goal minimizing the tax burden on dwellings. The majority opinion concedes that taxes ultimately will have to be borne by tenants regardless of the size of the building in which they live. See opinion below, p. 6a, *infra*. Imposing a greater tax burden on those who happen to live in buildings with five or more units is therefore arbitrary and contrary to the purpose of the classifications established in article X, § 4(b).

IV. The Statutory Distinction Between Four And Five Unit Buildings Does Not Foster Home Ownership As Suggested By The State Because It Would Only Serve To Discourage Home Ownership By Minorities And The Economically Disadvantaged.

In argument before the Missouri Supreme Court, the State suggested that the purpose of article X, § 4(b) was to classify property according to its use and that in enact-

ing § 137.016, the legislature wanted to ensure that all owner-occupied buildings would fall into the residential class. Wholly aside from the fact that the Missouri Supreme Court did not adopt this proffered construction of either article X, § 4(b) or § 137.016.1.(1), the State's assumed justification cannot withstand scrutiny.

The only conceivable purpose of imposing lower taxes on dwellings occupied by the owner is to encourage home ownership. However, as Judge Welliver pointed out in dissent, the effect of imposing a greater tax burden on buildings containing five or more dwelling units is not rationally related to this goal because it will only serve to make it more difficult for those who can least afford to buy a home. See opinion below, p. 30a, *infra*. (Welliver, J., dissenting). Perhaps in contrast with other areas of the country, larger multi-unit buildings in Missouri are not typically luxury high-rises for the wealthy.

Data from the U.S. Department of Commerce Bureau of the Census confirm the disparate impact of § 137.016.1.(1) on the economically disadvantaged and on minorities. The Census Bureau estimates that Missouri's population in 1980 was 88.4% white.[3] However, only 9.7% of Missouri's white households live in buildings with five or more dwelling units, in contrast with 20.1% of the state's black households, 29.5% of Asian and Pacific Island households, 15.8% of Spanish households and 14.15% of Indian, Eskimo and Aleut households.[4] Of those who rent

---

[3] U.S. Dept. of Commerce, Bureau of Census, 1980 Census of Housing, General Housing Characteristics, Missouri, pp. 27-16, Table 2.

[4] U.S. Dept. of Commerce, Bureau of Census, 1980 Census of Housing, Detailed Housing Characteristics, Missouri, pp. 27-12 to 27-32, Tables 55-59 (1980), [hereinafter "Detailed Housing Characteristics"].

their housing units, 19% of white households, 37.1% of black households and 23.95% of Spanish households are below the federally established poverty level.[5] Median incomes of renters as a group are substantially below those of homeowners, less than half as much for some groups.[6]

In light of such disparate impact, the legislative distinction between four unit and five unit multi-family residence buildings is manifestly incompatible with the state's assumed goal of encouraging home ownership. Those who are least able to purchase a home will find it even more difficult to save for one because of property taxes that are some 70% greater than those imposed on single family residential property.[7]

Even in the absence of such impact, available data does not support the State's implicit assumption that excluding buildings with five or more dwelling units and including buildings with four or more dwelling units in the definition of "residential property" would ensure that property more likely to be owner-occupied would fall in the residential class. For the state as a whole, 1980 census data indicates that there is no substantial difference in the proportion of 3 and 4 unit buildings that are owner-occupied compared with buildings containing five or more dwelling units—11.2% v. 8.1%[8]. Indeed, in rural areas, a

---

[5] *Id.*, pp. 27-45, Tables 68-70.

[6] *Id.*

[7] The total disparity in taxes is actually even greater because, aside from the higher assessment percentage, "commercial" property must also bear the burden of the surcharge replacing the previous merchants and manufacturers license tax. Mo. Const. art. X, § 6; see discussion p. 14, *supra*.

[8] Detailed Housing Characteristics, pp. 27-37, Table 60.

greater percentage of buildings with five or more dwelling units are owner-occupied compared with buildings of 3 and 4 units—30% v. 24.3%.[9] If there is no substantial difference in the degree of owner occupancy, the differentiation in § 137.016.1.(1) between structures containing four dwelling units and those containing more than four dwelling units cannot be considered rationally related to the State's assumed objective of placing owner-occupied buildings in the residential class.

V. The Rationale Suggested By The State Is Inconsistent With The Statutory Provision It Is Seeking To Defend.

The state's proffered rationale of owner-occupancy is also inconsistent with the remainder of § 137.016.1.(1). The statute provides that structures "which contain single dwelling units owned as a condominium" are considered residential property *regardless* of whether they are owner-occupied. A large percentage of rental apartments are owned as condominiums. Under this provision, however, *identical* multi-family buildings of five dwelling units or more will be taxed differently based on a factor (condominium platting) that is unrelated to owner-occupancy.

In the 1986 amendments to § 137.016.1.(1), the legislature again eschewed the State's asserted "owner-occupancy" rationale. By those amendments, the legislature declared that "vacant land in connection with an airport, and land used as a golf course shall be classified as residential property." Inasmuch as neither of these types of property require owner occupation or use as a dwelling, the State should not now be permitted to maintain that the purpose of either § 137.016.1.(1) or article X, § 4(b) is

---

[9] *Id.*

to encourage home ownership or owner-occupancy. *See Allied Stores* v. *Bowers*, 358 U.S. 528, 529 (1959); *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562 (1949).

Finally, as shown above, the ordinary meaning of the word "residential" and the only definition of "residential" accepted to date by the Missouri Supreme Court carry no connotation of owner-occupancy. In the absence of any interpretation by the Missouri Supreme Court that the people of Missouri intended by their use of the term "residential" in article X, § 4(b) to require owner-occupancy, this Court should not presume that any legislative intention to include only owner-occupied property constitutes a legitimate state purpose under Missouri law.

VI. Principles Of Federalism Require Thorough Appellate Review By This Court.

In *Fair Assessment in Real Estate* v. *McNary*, 454 U.S. 100 (1981), "principles of federalism" led this Court to bar access to federal courts for adjudication of federal constitutional challenges relating to state tax assessment. Surely those same principles of federalism now oblige this Court to ensure that state courts properly apply the standards established by its prior decisions for adjudication of federal constitutional claims. This Court cannot provide such assurance unless it requires more than conclusory statements deferring to legislative judgment. As Justice Marshall has observed, "[A]n inability to provide any reasons suggests that the decision is, in fact, arbitrary." *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 40 (1979) (Marshall, J. dissenting).

Only if some court at some stage of the proceeding can articulate a legitimate state purpose to be served and explain how the legislative criteria are rationally related to that purpose can this Court properly determine and

assure the citizenry that their federal rights to due process and equal protection of the law are being properly enforced. To date, that has not occurred in this case. Thus, summary affirmance or dismissal for want of a substantial federal question would lend this Courts' imprimatur to the demise of all federal constitutional rights pertaining to state taxation.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal and docket this case for argument. In the alternative, this Court should summarily reverse and remand this case to the Missouri Supreme Court with directions to determine: (1) the purpose of the classification of real property embodied in article X, § 4(b); (2) whether that purpose is legitimate; and (3) whether § 136.016.1.(1) is rationally related to that purpose.

Respectfully submitted,

LAWRENCE G. CRAHAN
Counsel of Record
DONALD U. BEIMDIEK
THOMAS B. WEAVER
JORDAN B. CHERRICK

ARMSTRONG, TEASDALE, KRAMER,
VAUGHAN & SCHLAFLY
611 Olive Street, Suite 1900
St. Louis, Missouri 63101
(314) 621-5070
Counsel for Appellants

APPENDIX

SUPREME COURT OF MISSOURI
en banc

No. 68671

ASSOCIATED INDUSTRIES OF MISSOURI, *et al.*,
Plaintiffs-Respondents/Cross-Appellants,

v.

STATE TAX COMMISSION OF MISSOURI, *et al.*,
Defendants-and Appellants/ Cross-Respondents.

(consolidated with)

F. GEORGE ALBERTUS, *et al.*,
Plaintiffs-Respondents,

v.

STATE TAX COMMISSION OF MISSOURI, *et al.*,
Defendants-Appellants/Cross-Respondents,

and

MISSOURI MERCHANTS & MANUFACTURERS ASSOCIATION, INC.,
Intervenor-Defendant/Cross-Appellant.

Duplicate of filing on Jan 8 1987 in Office of Clerk Supreme Court.

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY

The Honorable A.J. Seier, Special Judge

Individual and corporate taxpayers filed a declaratory judgment action, challenging the constitutionality of § 137.016, RSMo Supp. 1984 classifying as residential "all real property improved by a structure . . . which contains not more than four dwelling units. . . ." By reason of this classification, the involved property is assessed at 19% of its fair market value, whereas other rental property is classified in the general classification and assessed at 32% of its value. The trial court held

that the statute violated the due process and equal protection clauses of the Fourteenth Amendment of the U.S. Constitution and the "uniformity" clause of the Missouri Constitution, art. X, § 3, because it was arbitrary and unreasonable, and that it established a prohibited subclass of real property, in violation of art. X, § 4(b) of the Missouri Constitution. We conclude that the statute is not shown to be arbitrary or capricious and that the challenges have failed to overcome the presumption of constitutionality. We therefore reverse and remand for the entry of a declaratory judgment sustaining the validity of the statute against the challenges made.

In 1982, art. X, § 4(b) of the Missouri Constitution was amended to permit the establishment of three subclasses of real property. The amended provision reads as follows:

> Property in classes 1 [real property] and 2 [tangible personal property] and subclasses of those classes, shall be assessed for tax purposes at its value or such percentage of its value as may be fixed by law for each class and for each subclass. Property in class 3 and its subclasses shall be taxed only to the extent authorized and at the rate fixed by law for each class and subclass, and the tax shall be based on the annual yield and shall not exceeed eight percent thereof. Property in class 1 shall be subclassed in the following classifications:
>
> (1) Residential property;
>
> (2) Agricultural and horticultural property;
>
> (3) Utility, industrial, commercial, railroad and all other property not included in subclasses (1) and (2) of class 1.
>
> Property in the subclasses of class 1 may be defined by law, however subclasses (1), (2), and (3) shall not be further divided, provided, land in subclass (2) may by general law be assesed for tax purposes on its productive capability. The same percentage of value shall be applied to all properties within any subclass. No classes or subclasses shall have a percentage of its true value in money in excess of thirty-three and one-third percent.

The legislature then adopted the following statute (§ 137.016.1(1)):

> As used in section 4(b) of article X of the Missouri Constitution, the following terms mean:
>
> (1) "Residential property", all real property improved by a structure which is used or intended to be used for residential living by human occupants and which contains not more than four dwelling units or which contains single dwelling units owned as a condominium or in a cooperative housing association. . . .

Several taxpayers filed a declaratory judgment suit, asserting that the statute was unconstitutional on grounds as set out above. Other taxpayers intervened. The trial court upheld the challenges. The State Tax Commission appealed, as did some taxpayers who contended that the relief awarded by the circuit court was not appropriate. We have jurisdiction under art. V, § 3 of the Missouri Constitution, because the case involves the construction of the revenue laws of the state.

The fact that our Constitution and statutes permit the establishment of subclasses of real property, and provide for different rates of assessment of property in different subclasses, does not demonstrate a constitutional violation under either the due process or equal protection clauses of the Fourteenth Amendment of the United States Constitution. *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 527 (1959); *Pacific Express Co.* v. *Seibert*, 142 U.S. 339 (1892); *Bell's Gap Railroad Company* v. *Pennsylvania*, 134 U.S. 232 (1890). The plaintiffs do not make their case simply by showing that different classes of real property are assessed at different rates.

They argue, however, that the "rule of four" is wholly arbitrary and without reason, citing such cases as *State ex rel. Transport Manufacturing & Equipment Co.* v. *Bates*, 359 Mo. 1002, 224 S.W.2d 996 (banc 1949) (portion of statute exempting from use tax motor vehicles seating ten passengers or more held invalid as violating uniformity clause, Mo. Const. art. 10,

§ 3); *Airway Drive-In Theatre Co.* v. *City of St. Ann*, 354 S.W.2d 858 (Mo. banc 1962) (portion of ordinance levying annual license tax on drive-in theaters at $1.50 per speaker and on other motion picture theaters at $50.00 per year, resulting in drive-ins being taxed 17 to 30 times greater than motion picture theaters, held arbitrary and abuse of taxing power); *State ex rel. Garth* v. *Switzler*, 143 Mo. 287, 45 S.W. 245 (banc 1898) (law imposing inheritance tax at rate of five percent for property valued under $10,000, whereas rate was seven and one-half percent on value of estate in excess of $10,000, held unconstitutional).

We do not agree. Statutes are presumed to be constitutional until the contrary is shown. Every indulgence must be made in favor of the legislature's handiwork. Classifications based on number have often been sustained. *Bopp* v. *Spainhower*, 519 S.W.2d 281 (Mo. banc 1975) (reasonable basis exists for statute which allows majority of governing body of a city not within a county, a first-class county operating under charter and not containing a city of over 400,000 inhabitants and any city of 400,000 inhabitants within a first-class county to impose sales tax for transportation purposes without voter approval, whereas any other city with 500 or more inhabitants must obtain voter approval before levying tax); *Crane* v. *Riehn* 568 S.W.2d 525 (Mo. banc 1978) (statute under which spouse and minor children of a decedent who is survived by one or both parents must bring wrongful death suit within one year, though spouse and minor children of a decedent not survived by a parent have two years in which to bring suit, held constitutional); *Collins* v. *Director of Revenue*, 691 S.W.2d 246 (Mo. banc 1985) (summary license suspension statute which allows for conviction of violators of drunk driving laws with blood alcohol content of .13 percent, rather than .10 percent required for misdemeanor conviction, held not arbitrary or capricious).

Rental housing has both residential and commercial aspects. The legislature might appropriately conclude that the commercial aspect predominates for buildings containing numerous units, whereas those containing only a few units have a pre-

dominantly residential character. It might conclude that the selection of a definite figure, such as four, offered the most effective means of classifying rental property into residential and commercial categories. There might be reluctance to burden the owner of a small complex with commercial taxes, which necessarily will be passed on to the tenants. Larger units, however, might be expected to bear the commercial rate. We are unable to say that the legislature's choice lacked any rational basis. The cases relied on, then, are distinguishable.

Our conclusion is not changed because some elaborate "fourplexes" may bear all indicia of being commercial property. The legislature's judgment as to the overall picture must be respected. It should also be the function of the legislature to look for abuses and evasions of the governing principle and to take action if deemed appropriate. Perfect equity in the assessment of real property cannot be expected. The present constitutional and statutory provisions, coupled with state-wide reassessment, have the potential for relative equality of assessment of similarly classified property.

State ex rel. Transport Manufacturing and Equipment Co. v. *Bates, supra,* is characteristic of the cases holding that a taxing statute may be rendered unconstitutional by the presence of a wholly arbitrary exclusion or exemption. There a statute imposing use taxes on vehicles acquired out of the state did not apply by its terms to vehicles designed for 10 or more passengers. The court saw no rhyme or reason for the exclusion, and invalidated the statute. This case is distinguishable because the legislature might have concluded that there was a qualitative as well as a quantitative difference between smaller and larger housing complexes. It is of no moment that we as legislators might not have made the same choice.

The statute does not create a prohibited additional subclass of real property. Its purpose, rather, is to allocate rental property between two of the constitutionally approved subclasses. This allocation is within the power of the legislature, unless shown to be arbitrary or unreasonable.

Judge Donnelly points to the restrictions on classification of tangible and intangible personal property as set out in art. X, § 4(a) of the Constitution of 1945, and would apply these restrictions to the classification of real property. They are not made so applicable in the Constitution of 1945 or in the 1982 amendment to art. X, § 4(b). What the minutes of the 1945 convention show is that the members felt that, by allowing some classification of property for assessment purposes, it would be easier to obtain realistic valuations. The convention was not willing to permit subclassification of real property, but the 1982 amendment does so. It is the product of a long struggle to achieve greater uniformity in actual tax incidence. *See State ex rel. Cassilly* v. *Riney*, 576 S.W.2d 325 (Mo. banc 1979); *Breckenridge Hotels Corp.* v. *Leachman*, 571 S.W.2d 251 (Mo. banc 1978); *Pierre Chouteau Condominiums* v. *State Tax Commission*, 662 S.W.2d 513 (Mo. banc 1984).

We do not disagree with Judge Welliver's assertion that real estate taxes on rental property may ultimately be borne by the tenants. By the same token, taxes on commercial property are ultimately borne by the general public. The problem he points to is inherent in the permissible classification of real property for tax purposes. It does not necessarily follow that the normal renter has a more severe tax burden than the normal homeowner. The classifying decision was made by the legislature, with its superior means of information about the effects of legislation on the public, and for the reasons stated we are not persuaded that it exceeded the authority conferred by the amended art. X, § 4(b), or that its choice was otherwise constitutionally infirm.

The case presents no disputed issues of fact and is appropriate for final judgment. We do not have to decide any question of the appropriateness of the relief the trial court granted, because we conclude that the plaintiffs are not entitled to any of the relief they seek.

The judgment is reversed and the case remanded with directions to declare that the statute is not shown to be unconstitu-

tional on any of the grounds assigned.

CHARLES B. BLACKMAR, Judge

Higgins, C.J., and Morgan, Sr. J., concur; Robertson, J., concurs in separate opinion filed; Donnelly, J., dissents in separate opinion filed; Rendlen, J., dissents in separate opinion filed; Welliver, J., dissents in separate opinion filed and concurs in separate dissenting opinions of Donnelly and Rendlen, JJ. Billings, J., not sitting.

SUPREME COURT OF MISSOURI
en banc

No. 68671

ASSOCIATED INDUSTRIES OF MISSOURI, *et al.*,
Plaintiffs-Respondents/Cross-Appellants,

v.

STATE TAX COMMISSION OF MISSOURI, *et al.*,
Defendants-and Appellants/Cross-Respondents.

(consolidated with)

F. GEORGE ALBERTUS, *et al.*,
Plaintiffs-Respondents,

v.

STATE TAX COMMISSION OF MISSOURI, *et al.*,
Defendants-Appellants/Cross-Respondents,

and

MISSOURI MERCHANTS & MANUFACTURERS ASSOCIATION, INC.,
Intervenor-Defendant/Cross-Appellant.

Duplicate of filing on Jan 8 1987 in Office of Clerk Supreme Court.

CONCURRING OPINION

I completely concur in the principal opinion. I write separately for the purpose of explaining why the rather winsome arguments of the dissenters do not persuade me, despite my personal agreement with the result the dissenters reach.

The discussion of the constitutional debates found in Judge Donnelly's dissent provides an interesting historic aside to the issues before the Court in this case. However, this Court has long held that "'[i]t is, of course, fundamental that where the language of a statute is plain and admits of but one meaning

there is no room for construction.' This rule applies with equal force to constitutional provisions," *Rathjen* v. *Reorganized School District R-II of Shelby County*, 284 S.W.2d 517, 523 (Mo. banc 1955) *quoting Cummins* v. *Kansas City Public Service Co.*, 66 S.W.2d 920, 931 (Mo. banc 1933).

Were there some ambiguity in the constitutional language, we would be clearly justified in consulting the minutes of the Constitutional Convention for their persuasive, though not binding, effect. *Metal Form Corp* v. *Leachman*, 599 S.W.2d 922, 926 (Mo. banc 1980). However, Mo. Const. art. X, § 4(a) is not ambiguous. It provides in pertinent part that the General Assembly may "provide for further classification *within classes 2 [tangible personal property] and 3 [intangible personal property]*, based solely on the nature and characteristics of the property, and not on the nature, residence or business of the owner, or the amount owned. . . ." [Emphasis added]. No reference is made to real property in the pertinent sentence.

The fact that § 4(a) does not discuss the subclassification of real property is consistent with the debates. Delegates to the convention thought that "a great many people in Missouri had a great deal of fear that it [subclassification] ought not to apply to real estate." Tr. of Debates of Mo. Const., 1945, page 6306. Such subclassification was, therefore, not under active consideration at the time of the debates. With the 1982 amendment to Mo. Const. art. X, § 4(b), the people of Missouri, contrary to the fears expressed on their behalf at the 1945 Constitutional Convention, and contrary to any discussion about the subclassification of real estate which may have taken place at that convention, chose to allow the subclassification of real estate for tax purposes in Missouri.

A second canon of constitutional construction must be noted. "This Court has recognized that in the construction of constitutional provisions it should undertake to ascribe to words the meaning which the people understood them to have when the provision was adopted." *State ex rel. Danforth* v. *Cason*, 507 S.W.2d 405, 408 (Mo. banc 1973). Based on the plain language

submitted to the voters approving the 1945 Constitution, there can be little doubt that the makers[1] of our Constitution—the people—while approving the subclassification of class 2 and 3 property, formed no intent with regard to the subclassification of real property.

I cannot agree that § 4(a) contains a "base line" with regard to class one property. The "base line" which § 4(a) provides is limited by its own terms to property in classes 2 and 3; real property is not discussed. Thus, it is only by the surgical excision of the constitutional references to Class 2 and Class 3 property that such a "base line" can be found.

Nor, in my view, is there a need to harmonize § 4(a) and § 4(b). There is no conflict between the sections. To repeat, § 4(b) provides for subclassification of real property; § 4(a) does not consider that subject.

Even if one assumes for the sake of argument, that the General Assembly is restricted by the language of § 4(a), the issue presented in this case is not resolved. Real property developed as apartments partakes of a dual nature. Like commercial property, it produces income; like residential property it provides shelter. Thus, apartments are both residential and commercial.[2] In the presence of this dual nature, I am unwill-

---

[1] "Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them with the help of common sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss." *State* v. *Adkins*, 225 S.W. 981, 984 (Mo. 1920) (Williamson, J. concurring) *quoting* 1 Story, Constitution, § 451.

[2] The same can be said of a hotel, which provides an overnight (or longer) residence to its residents and income to its owner. In my opinion, it would be difficult to sustain an argument that a hotel is not commercial in nature, however.

ing to say that the General Assembly violated the constitution by choosing to define the primary nature of larger apartment complexes as commercial.

Nor does § 137.016.1 violate equal protection and due process, U.S. Const. Amend. XIV, or the uniformity clause of Mo. Const. art. X, § 3. An act of the legislature enjoys a presumption of constitutionality. It will not be declared unconstitutional unless it clearly and undoubtedly contravenes the Constitution. *Prokopf* v. *Whaley*, 592 S.W.2d 819, 824 (Mo. banc 1980). Further, the legislature is granted a broad discretion and wide latitude in constructing its classifications for taxation. *Lockport* v. *Citizens for Community Action*, 430 U.S. 259, 272 (1977); *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973). "[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Madden* v. *Kentucky*, 309 U.S. 83, 88 (1940).

Respondents do not claim that this case involves a fundamental right or invidious class discrimination. Thus, as Judge Rendlen appropriately notes in his dissent, the proper standard of review under the equal protection clause, the due process clause, and the uniformity clause is that the tax classifications established by the legislature have a rational basis; they cannot be palpably arbitrary. *State ex rel. Transport Manufacturing and Equipment Co.* v. *Bates*, 224 S.W.2d 996, 1000 (Mo. banc 1949); *Bridges Asphalt Co.* v. *Jacobsmeyer*, 142 S.W.2d 641, 643 (Mo. 1940); *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 527 (1959).

Is there a legitimate state end? No one challenges the legitimacy of the State exercising its taxing power through the imposition of ad valorem taxes on real property. Thus, the constitutional challenge turns on whether the classifications created by the legislature are rationally related to the State's interests in taxation.

It is argued that apartments are purely residential. Yet, as has already been discussed, apartments have an undeniably commercial aspect. Thus, in my view, the legislature would

have been justified in classifying all apartment property as commercial property.

The more thoughtful argument challenges the distinction drawn by the General Assembly between apartment property containing four or fewer units and apartment complexes containing five or more units. Does this distinction have a rational basis? As the principal opinion correctly holds, the distinction drawn by the legislature may have been based on the legislature's understanding that those "complexes" containing four or fewer units, because of their lack of size, are not truly commercial; such property may also have been developed for the purpose of providing housing for the extended family of the owner. These rationales are sufficient to ward off this constitutional challenge.[3] As the principal opinion indicates, the cases upon which Judge Rendlen's dissent relies for the proposition that this statute is unconstitutional are distinguishable.

As I have already confessed, I disagree with the policy choice made by the General Assembly. The temptation we face as judges, when equal protection is invoked, is to assume that any policy choice with which we disagree is irrational and therefore in violation of the Constitution. To succumb to the temptation to substitute our chosen policy for that adopted by the elected representatives of the people is, however, to confuse power with authority. The fact that our system of government entrusts us with the power to declare an act of the legislature unconstitutional does not mean that we can exercise that power to effectuate *our* policy choices, absent a violation of the Constitution. The fact that the General Assembly's decision may be considered odd by us, does not, in my view, also render it unconstitutional.

> [A] court is not free under the aegis of the Equal Protection Clause to substitute its judgment for the will of the

---

[3] The fact that clever apartment developers may defeat the commercial designation of their property under § 137.016.1 by dividing larger complex into separate ownership for each four apartments does not require a different result.

> people of a State as expressed in laws passed by their popularly elected legislatures. "The Constitution presumes that, absent some reasons to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance* v. *Bradley*, 440 U.S. [93], 97 [(1979)].

Parham v. *Hughes*, 441 U.S. 347, 351 (1979).

EDWARD D. ROBERTSON, JR., Judge

SUPREME COURT OF MISSOURI
en banc

No. 68671

ASSOCIATED INDUSTRIES OF MISSOURI, *et al.*,
Plaintiffs-Respondents/Cross-Appellants,

v.

STATE TAX COMMISSION OF MISSOURI, *et al.*,
Defendants-and Appellants/Cross-Respondents.

(consolidated with)

F. GEORGE ALBERTUS, *et al.*,
Plaintiffs-Respondents,

v.

STATE TAX COMMISSION OF MISSOURI, *et al.*,
Defendants-Appellants/Cross-Respondents,

and

MISSOURI MERCHANTS & MANUFACTURERS ASSOCIATION, INC.,
Intervenor-Defendant/Cross-Appellant.

Duplicate of filing on Jan 8 1987 in Office of Clerk Supreme Court.

DISSENTING OPINION

It is imperative that the constitutionality of § 137.016.1(1)[1] be resolved only after a close examination of the history of

---

[1] As used in § 4(b) of art. X of the Missouri Constitution, the following terms mean:

(1) "Residential property," all real property improved by a structure which is used or intended to be used for residential living by human occupants and which contains not more than four dwelling units or which contains single dwelling units owned as a condominium or in a cooperative housing association.

property classification in Missouri. As this Court recently noted in Metal Form Corp. v. Leachman, 599 S.W.2d 922, 925 (Mo. banc 1980),

> [T]here was no right to classify property for tax purposes before adoption of the 1945 Constitution. Art. X, § 4 of the 1875 Constitution provided that "[A]ll property subject to taxation shall be taxed in proportion to its value." That provision was interpreted in several cases by this court to place all taxable property into a single class and to prohibit the legislature from dividing the property into different classes for purposes of taxation. [citations omitted].

Missouri was one of the last states to adopt some form of property classification when it added art. X, § 4(a) to the Constitution in 1945. Art. X, § 4(a)[2], permitted classification for tax purposes as follows:

> All taxable property shall be classified for tax purposes as follows: class 1, real property; class 2, tangible personal property; class 3, intangible personal property. *The general assembly, by general law, may provide for further classification within classes 2 and 3, based solely on the nature and characteristics of the property, and not on the nature, residence or business of the owner, or the amount owned.* . . . [emphasis added]

Furthermore, § 4(b) of the 1945 Constitution provided:

> Property in classes 1 and 2 and subclasses of class 2 shall be assessed for tax purposes at its value or such percentage of its value as may be fixed by law for each class and for each sublass of class 2. Property in class 3 and its subclasses shall be taxed only to the extent authorized and at the rate fixed by law for each class and subclass, and the tax shall be based on the annual yield and shall not exceed eight per cent thereof.

In 1982, § 4(b) was amended in a special election by adding the following:

> Property in class 1 shall be subclassed in the following classifications:

---

[2] Art. X, § 4(a) remains unchanged today.

(1) Residential property;

(2) Agricultural and horticultural property;

(3) Utility, industrial, commercial, railroad, and all other property not included in subclasses (1) and (2) of class 1.

Property in the subclasses of class 1 may be defined by law, however, subclasses (1), (2), and (3) shall not be further divided, provided, land in subclass (2) may by general law be assessed for tax purposes on its productive capability. . . .

Article X, § 4, by the use of a classification scheme, was the culmination of many years of effort to achieve equality in taxation among the various types of property. This section was thought of as "the most important section" of Article X because of the prior inequities in the Missouri tax system. Transcript of the Debates of the Missouri Constitution 1945, p. 7471 (hereinafter Debates). Before the adoption of § 4(a), the burden of financing local governments in this State fell squarely on the shoulders of real property owners. The importance of this section was also exemplifed by the separate consideration and lengthy discussion it was given in the constitutional convention. However, a statement of the ultimate goal of the framers does not provide any answers to the questions raised by the legislature's attempt to statutorily distinguish between residential and commercial property as is suggested by the principal opinion.

It is a well-established rule that constitutional provisions must be construed as a whole so as not to destroy the general intent and purpose of the framers. State at the Information of Martin v. City of Independence, 518 S.W.2d 63, 66 (Mo. 1974). In doing so, it is permissible to consult the proceedings and debates of the framers. *Leachman*, *supra* at p. 926. Moreover, this Court must give due regard to the primary objectives of the provision under scrutiny as viewed in harmony with all related provisions, considered as a whole. Roberts v. McNary, 635 S.W.2d 332, 335 (Mo. banc 1982). Thus § 4(b) must be harmonized consistent with § 4 as a whole.

In the 1943-44 constitutional convention, the debate over property classification centered on this question: To which classes of property would certain restrictive language in § 4(a) apply? This language was commonly referred to as the "Shepley Amendment."[3] Essentially, it provides that legislative classification of tangible and intangible personal property is limited to the "nature and characteristics of the *property*," and does not extend to the incidents of ownership.

The original committee report expressly applied the restrictions to *all* three classes of property, but later the restrictions were removed as to class 1. The framers gave several reasons for not expressly applying the restrictions of § 4(a) to the real property class. Perhaps the most important reason was an explicit fear that if real property classification was attempted by the legislature, there would be an "internal war" and particular properties would be singled out for inequitable treatment as a consequence. For example, "the brewer was afraid they would pick out the brewers' real estate. The railroad was afraid [they] would pick out the railroads' real estate. *Some apartment ownes were afraid [they] would pick out apartment buildings*. . . ." (Emphasis added.) *Debates*, p.6305-06.

Another reason, as expressed by the author of the amendment, was that there was really no need for real property subclassification in Missouri as evidenced by the experiences of other states which had adopted similar classification systems. Mr. Shepley stated:

> [W]e could find in Missouri, no other state where the subclassification of real estate has amounted to very much. There doesn't seem to be very much justification for it because all real estate is dependent upon the services of local government. That varies with personal property depending upon the type of personal property and there is

---

[3] "The general assembly by general law, may provide for further classification within classes 2 and 3, based solely on the nature and characteristics of the property, and not on the nature, residence or business of the owner, or the amount owned. . . ."

> justification for distinguishing between those that require more than those that require the less service.

Debates, p. 6309.

The final reason given was that it was unnecessary to further apply the restrictions of § 4(a) because it was believed that the courts of this State would never "permit a classification to be based upon ownership or owned property." *Debates*, p. 6311. The principal opinion does not, and cannot, deny that art. X, § 4(b) contains no basis for "defining by law" which property falls within the subclasses of class 1. The only baseline is contained in art. X, § 4(a): "The general assembly, by general law, may provide for further classifications . . . based solely on the nature and characteristics of the property, and not on the nature, residence or business of the owner, or the amount owned." *Id.* The constitutional debates are unequivocal reference whether this standard would have applied to class 1 property. *Debates*, pp. 6305-06. Constitutional provisions speaking to the same subject, here classifications for tax assessment, must be construed as a whole. What the principal opinion holds, essentially, is that the legislature of this State may accomplish by referendum what is prohibited by the product of constitutional convention.

In my view, *only* agricultural and horticultural property in subclass (2) may be assessed on its productive capability under § 4(b). The principal opinion misconstrues § 4(b) and holds, in effect, that *residential* property in subclass (1) "may by general law be assessed for tax purposes on its productive capability."

Those provisions of § 137.016.1 which define the type of real property at issue in terms of the owner's business and the amount owned are unconstitutional and should be excised.

I respectfully dissent.

ROBERT T. DONNELLY, Judge

SUPREME COURT OF MISSOURI
en banc

No. 68671

ASSOCIATED INDUSTRIES OF MISSOURI, *et al.*,
Plaintiffs-Respondents/Cross-Appellants,

v.

STATE TAX COMMISSION OF MISSOURI, *et al.*,
Defendants-and Appellants/Cross-Respondents.

(consolidated with)

F. GEORGE ALBERTUS, *et al.*,
Plaintiffs-Respondents,

v.

STATE TAX COMMISSION OF MISSOURI, *et al.*,
Defendants-Appellants/Cross-Respondents,

and

MISSOURI MERCHANTS & MANUFACTURERS ASSOCIATION, INC.,
Intervenor-Defendant/Cross-Appellant.

Duplicate of filing on Jan 8 1987 in Office of Clerk Supreme Court.

DISSENTING OPINION

I respectfully dissent.

By the terms of §§ 137.016.1, RSMo Cum. Sup. 1984, and 137.115.5, RSMo Supp. 1985, real property improved by a residential structure containing not more than four dwelling units is "residential property" and is assessed at nineteen percent of its true value, while real property improved by a residential structure containing five or more dwelling units is within the subclass of "utility, industrial, commercial, and rail-

road property" and is assessed at thirty-two percent of its true value. The legislature is empowered to define the three subclasses of real property, (1) "residential property," (2) "agricultural and horticultural property," and (3) "utility, industrial, commercial, railroad, and all other property not included in subclasses (1) and (2)." Mo. Const. art. X, § 4(b). However, the legislature's discretion to so define is not unfettered for there are constitutional limitations upon the legislature's authority to classify property for purposes of taxation.

For the reasons stated by Judge Donnelly in his dissenting opinion, Mo. Const. art. X, §§ 4(a) and 4(b) must be read together. Thus through its efforts to "define" property in the three subclasses of real property, Mo. Const. art. X, § 4(b), the legislature must classify property "based solely on the nature and characteristics of the property, and not on the nature, residence or business of the owner, or the amount owned." Mo. Const. art. X, § 4(a). The challenged classifications fail this requirement. Additionally, § 137.016.1(1), in distinguishing residential structures based upon whether they contain "not more than four dwelling units," is further division in direct contradiction to the constitutional prohibition, Mo. Const. art. X, § 4(b), that "subclasses (1), (2), and (3) shall not be further divided."

Furthermore, there appears no rational basis for the distinction for tax purposes between residential structures containing four dwelling units and those containing five, and it therefore violates equal protection and due process, U.S. Const. amend. XIV, and the uniformity clause of Mo. Const. art. X, § 3. The "uniformity clause" of Mo. Const. art. X, § 3, requires that classification of property for purposes of taxation not be "palpably arbitrary." *State ex rel. Transport Manufacturing & Equipment Co.* v. *Bates*, 359 Mo. 1002, 224 S.W.2d 996, 1000 (banc 1949).

> [W]hile the General Assembly may enact statutes applicable to and classifying certain persons or property for taxation purposes yet such classification must include all persons or objects naturally falling within the class.

> Constitutional class taxation must include within the established class all who belong in it and must exclude all who do not belong in it. All in each natural class must be taxed or exempted alike. A natural class may not be split.

Id. Similarly, due process requires that taxes not be based upon a "palpably arbitrary" plan, *Bridges Asphalt Co.* v. *Jacobsmeyer*, 142 S.W.2d 641, 643 (Mo. 1940), and equal protection demands that classifications made for purposes of taxation have a "rational basis" and not be "palpably arbitrary." *Allied Stores, Inc.* v. *Bowers*, 358 U.S. 522, 527 (1959).

As conceded by the principal opinion, we previously have struck down classifications for which there were no rational bases. In *State ex rel. Transport Manufacturing & Equipment Co.* v. *Bates*, 224 S.W.2d 996, 1000-1001, we held unconstitutional a motor vehicle use tax levied upon those with a seating capacity of not more than nine passengers but not upon those having a seating capacity of ten or more, concluding that the distinction was "without reason or rational basis." Similarly, in *Airway Drive-In Theatre Co.* v. *City of St. Ann*, 354 S.W.2d 858, 860-62 (Mo. banc 1962), we held unconstitutional an annual license tax of $1.50 per speaker levied upon drive-in theaters where indoor theaters were taxed at the flat rate of $50 per year, concluding that the dinstinction was "arbitrary, unreasonable and without substantial justification." In *State ex rel. Garth* v. *Switzler*, 143 Mo. 287, 45 S.W. 245, 252-54, (1898), this Court held unconstitutional a law intending to impose a "collateral succession tax" of 5% on property valued up to $10,000 but an additional 7½% tax on property in excess of $10,000, concluding such to be "an arbitrary classification, without rhyme or reason." Additionally, in *City of St. Louis* v. *Spiegel*, 75 Mo. 145, 147 (1881), we held unconstitutionally discriminatory a "meat-shop ordinance" imposing a $25 tax in one part of the city and a $100 tax in another part. Similarly in the case sub judice, I discern no rational basis for taxing differently buildings with not more than four dwelling units and those with five or more. Such classification for tax purposes is "palpably arbitrary." The vague rationales hypothesized by the defendants and the prin-

cipal opinion for classifying a building of four units as "residential" property but one of five units as "commercial" leave me wholly unpersuaded. The property, whether four units or five, falls within the same natural class.

The numerical classifications sustained in the cases relied upon by the principal opinion, *Collins* v. *Director of Revenue*, 691 S.W.2d 246 (Mo. banc 1985); *Crane* v. *Riehn*, 568 S.W.2d 525 (Mo. banc 1978); *Bopp* v. *Spainhower*, 519 S.W.2d 281 (Mo. banc 1975), are readily distinguishable from the present. In *Collins*, 691 S.W.2d at 249-50, appellants challenged the statutory scheme for the summary suspension of driving privileges as violative of equal protection, contending that the separate classification for persons with a blood alcohol content of .13 percent or greater was arbitrary and capricious in view of the legislative presumption that persons with a blood alcohol content of at least .10 percent are intoxicated. We rejected the claim, concluding that, because it is "clear that the proportion of people whose driving ability is impaired and the extent of that impairment rises with increasing blood-alcohol levels," "there exists some 'reasonable basis' for the legislative classification." *Id.* at 250. However it is not at all so clear that multi-unit dwelling structures transform from residential to commercial property as the number of units increases for four to five. In *Crane*, 568 S.W.2d at 527-30, we rejected plaintiffs' equal protection challenge to a statute requiring the spouse and minor children of a decedent survived by a parent to bring a wrongful death action within one year of decedent's death even though the spouse and minor children of a decedent not survived by a parent had two years in which to bring a wrongful death action. But in *Crane*, unlike in the present case, there was a rational basis for treating the two classes differently since where decedent was survived by parent as well as by spouse or minor children the claim passed to the parents of the decedent if the spouse and minor children failed to sue within the one-year period. *Id.* Finally, in *Bopp*, 519 S.W.2d at 286-89, we rejected plaintiff's equal protection challenge to a statute allowing a city not within a county, a first-class county operating under

charter and not containing a city or part of a city of over 400,000 inhabitants, and any city of 400,000 inhabitants wholly or partially within a first-class county to levy a sales tax for transportation purposes without voter approval, though any other city with a population of 500 or more could levy a tax only upon voter approval. There, unlike here, a rational basis existed for the classification, *i.e.*, the more acute public transportation problems found in large metropolitan areas. *Id.*

For the reasons stated, I would affirm the trial court's judgment.

ALBERT L. RENDLEN

SUPREME COURT OF MISSOURI
en banc

No. 68671

ASSOCIATED INDUSTRIES OF MISSOURI, *et al.*,
Plaintiff-Respondents/
Cross-Appellants,

v.

STATE TAX COMMISSION OF MISSOURI, *et al.*,
Defendants-and Appellants/Cross-Respondents.

(consolidated with)

F. GEORGE ALBERTUS, *et al.*,
Plaintiffs-Respondents,

v.

STATE TAX COMMISSION OF MISSOURI, *et al.*,
Defendants-Appellants/Cross-Respondents,

and

MISSOURI MERCHANTS & MANUFACTURERS ASSOCIATION, INC.,
Intervenor-Defendant/Cross-Appellant.

Duplicate of filing on Jan 8 1987 in Office of Clerk Supreme Court.

DISSENTING OPINION

I respectfully dissent.[1]

---

[1] My brother, Robertson, J., in his concurring opinion, has stated: "I write separately for the purpose of explaining why the rather winsome arguments of the dissenters do not persuade me, despite my personal agreement with the result the dissenters reach."

The Oxford English Dictionary defines "winsome" to be "1. pleasant, delightful, agreeable," "3. Pleasing or attractive in appearance,

If there is but one thing I have learned in the judiciary, it is that a principal opinion which cannot stand as written without later purporting to answer the dissents which it invites is an opinion flawed from the beginning.

The time has come for government at all levels to get honest with the people. This also applies to the judicial branch. There is no excuse for the judiciary hiding either its own acts or the acts of the executive or legislative branches behind high-sounding legal phrases. I refer to the use of very legal sounding phrases, such as: "the statute is not shown to be arbitrary or capricious," "the challenges have failed to overcome the presumption of constitutionality," "statutes are presumed to be constitutional until the contrary is shown," "every indulgence must be made in favor of the legislature's handiwork," or "we are unable to say that the legislature's choice lacked any rational basis," all appearing in the principal opinion.

---

handsome, comely; of attractive nature or disposition, of winning character or manners," and "4. Cheerful, joyous, gay." 12 Oxford English Dictionary 180 (2d ed. 1961). "Winsome" means "winning; charming; engaging." The American Heritage Dictionary 1469 (1970). Webster's defines "winsome" as "causing joy or pleasure: AGREEABLE, PLEASANT, WINNING." Webster's Third New International Dictionary 2622 (4th ed. 1976)."

"Winsome" is synonymous to "winning," "agreeable," "alluring," "likable," "delightul," "cheerful," "courteous," "winning," "engaging," "charming," "pleasing," "enjoyable," "exquisite," "fair," "pretty," "handsome," "graceful," "delectable," "elegant," "prepossessing," and "refined." Roget's Thesarus 1177 (3d ed. 1946); J. Rodale, *The Synonym Finder* 1346 (1978)."

It is difficult for me to understand how one so politically oriented could in one breath find the arguments of my brothers Donnelly and Rendlin, JJ., so "winning," "agreeable," "attractive," "pleasing," "alluring," "engaging," "fair," and "refined," and in the next breath publicly state that they are unpersuasive. It is even more difficult for me to understand how he agrees with the dissenters' result and yet concurs in the result reached by the principal opinion.

One cannot dispute that the primary obligation of all courts to the people is that, in construing constitutions, statutes, instruments, or documents, the words used by the drafters should be given their clear, plain and unambiguous meaning. No one could state the rule better than Robertson, J., (concurring herein) where he states "'[i]t is, of course, fundamental that where the language of a statute is plain and admits of but one meaning there is no room for construction.' This rule applies with equal force to constitutional provisions.'" (Citations omitted.) If there is found to be an ambiguity or conflict in the words used in any of these, the courts then resort to the long-accepted rules and presumptions of interpretation and construction utilized by prior courts in arriving at what was meant by the persons who used the ambiguous words in question.

There is only one issue: is there a clear, unambiguous meaning to the words of Article X, Section 4(b) of the Missouri Constitution, or, is there a conflict and ambiguity which the Court is required to resolve?

The words in question used in this case were chosen by the elected representatives of the people of Missouri and approved by the people to amend their constitution. Mo. Const. art. X, § 4(b). So that there can be no accusation of misrepresentation of those words, they are set forth in full, together with those of preexisting section 4(a) of Article X of the Missouri Constitution, with the words particularly applicable to this case underlined.

> Section 4(a). Classification of taxable property—taxes on franchises, incomes, excises and licenses. *All taxable property shall be classified for tax purposes as follows: class 1, real property; class 2, tangible personal property; class 3, intangible personal property. The general assembly, by general law, may provide for further classification and within classes 2 and 3, based solely on the nature and characteristics of the property, and not on the nature, residence or business of the owner, or the amount owned.* Nothing in this section shall prevent the taxing of franchises, privileges or incomes, or the levying of excise or

motor vehicle license taxes, or any other taxes of the same or different types.

Mo. Const. art. X. § 4(a) (emphasis added).

Section 4(b). Basis of assessment of tangible property—real property—taxation of intangibles—limitations.—Property in classes 1 and 2 and subclasses of those classes, shall be assessed for tax purposes at its value or such percentage of its value as may be fixed by law for each class and for each subclass. Property in class 3 and its subclasses shall be taxes only to the extent authorized and at the rate fixed by law for each class and subclass, and the tax shall be based on the annual yield and shall not exceed eight percent thereof. *Property in class 1 shall be subclassed in the following classifications:*

(1) Residential property;

(2) Agricultural and horticultural property;

(3) Utility, industrial, commercial, railroad, and all other property not included in subclasses (1) and (2) of class 1.

Property in the subclasses of class 1 may be defined by law, however subclasses (1) (2), and (3) shall not be further divided, provided, land in subclass (2) may by general law be assessed for tax purposes on its productive capability. The same percentage of value shall be applied to all properties within any subclass. No classes or subclass shall have a percentage of its true value in money in excess of thirty-three and one-third percent.

Mo. Const. art. X. § 4(b) (proposed by Mo. Laws 1982, p. 734; adopted at special election of August 3, 1982) (emphasis added).

The Constitution of 1875 provided that "All property subject to taxation shall be taxed in proportion to its value." Mo. Const. of 1875, art. X. § 4. This was an absolute prohibition on classification for tax purposes. *Metal Form Corp.* v. *Leachman*, 599 S.W.2d 922, 925 (Mo. banc 1980).

In 1945, Missouri adopted a new constitution which provided three classes of property for tax purposes, (1) real property (2)

tangible personal property, and (3) intangible personal property. In 1982, Missouri amended its constitution by adopting Article X, Section 4(b) which allowed limited, specified subclassifications of the classes set forth in Mo. Const. art. X, § 4(a). Clearly, the people by the amendment, took real property and divided it into three subclasses, (1) residential, (2) agricultural, and (3) commercial. Mo. Const. art. X, § 4(b) (adopted 1982).

The people said that property in the subclasses of class (1) "real property," *i.e.*, (1) "residential property," (2) "agricultural property," and (3) "commercial property," "may be *defined* by law." Having so said, they added these limiting words: "however, subclasses (1), (2), and (3) *shall not be further divided*, . . ." Mo. Const. art. X, § 4(b) (emphasis added). The people then provided that farm land could be assessed on "its productive capability" as opposed to its costs; that the same percentage of value shall apply to all property within any subclass, and, that no real property could have a percentage in excess of thirty-three and one-third percent of true value.

Based upon prior taxing practices in this state, I doubt that there was a Missouri citizen who did not realize that this would ultimately result in agricultural property getting the lowest rate, residential the next lowest, and commercial property, the tax on which would pass back to the general public through pricing of products and services, being taxed at the highest rate. This the people could do, unless this classification had no rational basis and thereby offended the equal protection guaranteed by the United States Constitution, a question not raised by any party.

Surely no one could logically and rationally argue that the grant of the power to define property within the subclasses of real property was a grant of the power to destroy the classification just created. The word "define" has never before been so used. That is not its clear, unambiguous meaning. This is particularly true where the power to define is followed by the expressly limiting words "however, subclasses (1) [residential],

(2) [agricultural], and (3) [commercial] *shall not be further divided.*" Mo. Const. art. X, § 4(b) (emphasis added). Is it possible that words could have been chosen having a clearer and more unambiguous meaning? The clear, unambiguous meaning of the words used constitutes an absolute prohibition against further subclassifying "residential" property.

Where is the ambiguity in the words "residential property" that would permit the legislature or authorize us to say that "residential property" is one thing if it contains not more than four units, and something else if it contains more than four units. There is no ambiguity. The clear, unambiguous meaning of "residential property" is property in which people reside. The Missouri General Assembly has defined "Residential Housing" to mean "a specific facility, work or improvement within this state, undertaken primarily to provide dwelling accommodations . . . ." § 215.010, RSMo 1978. The United States Congress has defined the term "residential building" to mean "any structure which is constructed and developed for residential occupancy." 42 U.S.C. § 6832 (1982). The Oxford English Dictionary defines "residential" as "1. Serving or used as a residence; in which one resides. . . . 2. Connected with, pertaining or relating to, residence, or residences (in general or specific sense) . . . . ," and "residence" as "5. The place where one resides; one's dwelling place; the abode of a person . . . ." 8 Oxford English Dictionary 517-19 (2d ed. 1961). Webster's Dictionary defines "residential" as "1 a; used, serving, or designed as a residence or for occupation by residents . . . 3: of, relating to, or connected with residence or residences . . . ." Webster's Third New International Dictionary 1931 (4th ed. 1976).

Attributing to the words of Article X, Section 4(a) and 4(b), their clear and unambiguous meaning and their usual customary usage meaning, these sections specifically prohibit doing exactly what the legislature did when it adopted § 137.016.1(1), RSMo Cum. Supp. 1984.

The total absurdity of the result reached by the principal opinion and the concurring opinion can only be understood

when you realize that they take that part of subclass 1, "residential property," having in excess of four living units, and make it a part of subclass 3 "commercial" property, while subclass 3 is stated by the Constitution to include "utility, industrial, commercial, railroad and all other property *not included, in subclasses (1)* (residential) and (2) (agricultural) *of class (1)* (real property). Mo. Const. art. X, § 4(b) (emphasis added). What, pray tell, do residential buildings having more than four units have in common with "utility, industrial, commercial, railroad *and all other property not included in subclasses* (1) [residential] and (2) [agricultural] of class (1) [real property]." Mo. Const. art. X, § 4(b) (emphasis added).

I am shocked at the majority's disregard for the rights of the renting population of the state. By refusing to read the plain words adopted by the people in Mo. Const. art. X, § 4(b), in their plain and ordinary meaning, the majority places this Court's approval upon the most regressive tax statute ever devised. While there are a few affluent who rent as a matter of choice, the great majority who reside in rental units do so because of their financial inability to buy their own residences. Anyone who thinks that the tax on the rental residences will not be passed on to the renter by the owner thinks and reasons in a vacuum. The price in Missouri for being compelled to rent a residence will be that the renter will pay indirectly approximately seventy percent more residential real estate tax than those who are fortunate enough to be able to own their residence. This places the heaviest tax burden on those who can least afford to bear it. The ability of Missouri renters to achieve the dream of residential ownership will be put off in time in the same proportion that the seventy percent additional indirect but very real residential real estate tax bears to their otherwise savable income.

The only hope for the renting population of this State lies in finding a higher court which may recognize that the right of this Court to misconstrue its own Constitution is limited by the Federal constitutional requirement that there must be a rational basis for the resulting classes, which is discussed by

Rendlen, J., in his dissent. When those who are compelled to rent ultimately bear seventy percent more residential real estate tax than those of us who are more fortunate and can own our residence, there can be no rational basis for such a classification either by statute or by judicial misinterpretation.

The renting population of this State is a substantial part of Missouri's population. It is unfortunate that the important question of whether the rental property in which they live shall bear almost seventy percent more real estate tax than the residences of the more fortunate who own their homes should be decided by a split court, the regular members of which are evenly divided on this question.

I would set aside the submission and have the cause reargued before the regular Court. In the alternative, I would affirm the trial court and hold § 137.016.1(1), RSMo Cum. Supp. 1984, to be unconstitutional.

I concur in the separate dissenting opinions of Donnelly, J. and Rendlen, J.

WARREN D. WELLIVER, Judge

No. 68671

Circuit Court Nos. 185-622CC & 185-483CC

IN THE SUPREME COURT OF MISSOURI

September Session, 1986

ASSOCIATED INDUSTRIES OF MISSOURI, *et al.*,
Plaintiffs-Respondents/Cross-Appellants,

v.

STATE TAX COMMISSION OF MISSOURI, *et al.*,
Defendants-and Appellants/Cross-Respondents.

(consolidated with)

F. GEORGE ALBERTUS, *et al.*,
Plaintiffs-Respondents,

v.

STATE TAX COMMISSION OF MISSOURI, *et al.*,
Defendants-Appellants/Cross-Respondents,

and

MISSOURI MERCHANTS & MANUFACTURERS ASSOCIATION, INC.,
Intervenor-Defendant/Cross-Appellant.

Appeal From The Circuit Court Of Cole County

Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Cole County rendered be reversed, annulled and for naught held and esteemed, and that the said defts.-apps./cross-resps. be restored to all things which they have lost by reason of the said judgment. It is further considered and adjudged by the court that the said cause be remanded to the said Circuit Court of Cole County for further proceedings to be had therein, in conformity with the opinion of this

court herein deliverd; and that the said defts.-apps./cross-resps. recover against the said plffs.-resps./cross-apps. costs and charges herein expended, and have execution therefor.

(Opinion filed.)

STATE OF MISSOURI-Set.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of judgment of said Supreme Court, entered of record at the September Session thereof, 1986 and on the 8th day of January 1987, in the above entitled cause.

Given under my hand and seal of said Court at the City of Jefferson City, this 8th day of January 1987.

/s/ THOMAS F. SIMON, Clerk

/s/ by MARY ELIZABETH MCHANEY, D.C.

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
Post Office Box 150
Jefferson City, Missouri
THOMAS F. SIMON 65102 TELEPHONE
CLERK February 17, 1987 (314) 751-4144

Mr. John Wm. Buechner
Mr. James Owen
13523 Barrett Pkwy., Suite 141
Manchester, Missouri 63011

Re: *Associated Industries of Missouri, et al.* v. *State Tax Commission of Missouri, et al.* (CONSOLIDATED WITH) *F. George Albertus, et al.* v. *State Tax Commission, et al., Missouri Merchants & Manufacturers Association, No. 68671*

Dear Mr. Buechner:

This is to advise that the Court this day entered the following order in the above-entitled cause:

"Plaintiffs-Respondents F. George Albertus, et al.'s motion for rehearing overruled."

Very truly yours,

/s/ THOMAS F. SIMON,
Clerk

cc: Mr. Richard Schnake
Mr. Duane Benton
Mr. Steven L. Wright
Attorney General
(Mr. Richard Weiler)
Mr. Thomas R. Schwartz, Jr.

SUPREME COURT OF MISSOURI
en banc

No. 68671

ASSOCIATED INDUSTRIES OF MISSOURI, *et al.*,
Plaintiffs-Respondents/Cross-Appellants,

v.

STATE TAX COMMISSION OF MISSOURI, *et al.*,
Defendants-Appellants/Cross-Respondents,

Consolidated With:

F. GEORGE ALBERTUS, *et al.*,
Plaintiffs-Respondents,

v.

STATE TAX COMMISSION OF MISSOURI, *et al.*,
Defendants-Appellants/Cross-Respondents,

MISSOURI MERCHANTS & MANUFACTURERS ASSOCIATION, INC.,
Intervenors-Defendants/Cross-Appellants.

March 13, 1987

ORDER

The enforcement of the judgment entered herein is stayed pending appeal to the Supreme Court of the United States.

Day—to—Day

/s/ ANDREW JACKSON HIGGINS
Chief Justice

IN THE SUPREME COURT OF
THE STATE OF MISSOURI
en banc

No. 68671

F. GEORGE ALBERTUS, *et al.*,
Plaintiffs-Respondents,

v.

STATE TAX COMMISSION OF MISSOURI, *et al.*,
Defendants-Appellants/Cross-Respondents,

and

MISSOURI MERCHANTS AND MANUFACTURERS ASSOCIATION, INC.,
Intervenor-Defendant/Cross-Appellant.

(consolidated with)

ASSOCIATED INDUSTRIES OF MISSOURI, *et al.*,
Plaintiffs-Respondents/Cross-Appellants,

v.

STATE TAX COMMISSION OF MISSOURI, *et al.*,
Defendants-and Appellants/Cross-Respondents.

FILED Mar 12 1987 THOMAS F. SIMON CLERK, SUPREME COURT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that F. George Albertus, Loretta S. Kernebeck, Irving C. Rubin and Paul Koch, Plaintiffs-Respondents above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Missouri, reversing the judgment of the Circuit Court that § 137.016 violates the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution, entered in this action January 8,

1987. The Motion for Rehearing filed by Plaintifffs-Respondents F. George Albertus, et al., was overruled on February 17, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

DONALD U. BEIMDIEK
LAWRENCE G. CRAHAN
THOMAS B. WEAVER
JORDAN B. CHERRICK
ARMSTRONG, TEASDALE, KRAMER, VAUGHAN & SCHLAFLY
611 Olive Street, Suite 1900
St. Louis, Missouri 63101
(314) 621-5070

/s/ By _____
DONALD U. BEIMDIEK #15873

Attorneys For
F. George Albertus, et al.

CERTIFICATE OF SERVICE

I Donald U. Beimdiek, a member of the Bar of this Court, hereby certify that I have served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on all counsel of record at the addresses listed below by depositing same in the United States mail, first class postage prepaid, this 11th day of March, 1987. I further certify that all parties entitled to be served have been served.

Mr. Richard L. Wieler
Assistant Attorney General
P.O. Box 899
Jefferson City, Missouri 65102

Mr. Thomas R. Schwartz, Jr.
State Tax Commission
P.O. Box 146

Jefferson City, Missouri 65102
Attorneys for Appellants/Cross-Respondents
State Tax Commission of Missouri, et al.

Mr. Duane Benton
215 East High Street
P.O. Box 1251
Jefferson City, Missouri 65102
Attorney for Intervenor/Appellant/Cross-Respondent
Missouri Merchants & Manufacturers Association

Mr. Steven L. Wright
1809 Vandiver Drive
Columbia, Missouri 65202
Attorney for Amicus Curiae
Missouri School Boards Association

Mr. Jerry Redfern
Mr. Richard L. Schnake
NEALE, NEWMAN, BRADSHAW & FREEMAN
P.O. Box 10327
Springfield, Missouri 65808
Attorneys for Respondents/Cross-Appellants
Associated Industries of Missouri, et al.

/s/ _____

DONALD U. BEIMDIEK
ARMSTRONG, TEASDALE, KRAMER, VAUGHAN & SCHLAFLY
611 Olive Street, Suite 1900
St. Louis, Missouri 63101
(314) 621-5070
Attorneys For
F. George Albertus, et al.

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

Cause No. CV185-622CC Division I
Cause No. CV185-483CC

ASSOCIATED INDUSTRIES OF MISSOURI, *et al.*,
Plaintiffs,

v.

MISSOURI STATE TAX COMMISSION, *et al.*,
Defendants.

(consolidated with)

F. GEORGE ALBERTUS, *et al.*,
Plaintiffs,

v.

STATE TAX COMMISSION OF MISSOURI, *et al.*,
Defendants.

FINDINGS OF FACT

1. In conjunction with a hearing on summary judgment motions filed by the plaintiffs, it was agreed by all parties that all facts necessary to resolution of the issues oustanding are contained in those portions of the petitions which were admitted to and in the answers to the interrogatories, and further, that no material facts are in issue between the parties.

2. Plaintiff F. George Albertus is a resident of the City of St. Louis, State of Missouri, who owns a building containing six (6) dwelling units, one of which is his residence. Plaintiff has been advised by the assessor of the City of St. Louis that his units have classified as "utility, industrial, commercial, railroad, and all other property not included in subclasses (1) and (2) of Class 1, hereinafter referred to as "subclass 3" property.

3. Plaintiff Associated Industries of Missouri is a not-for-profit Missouri corporation, the members of which include various corporation and other businesses that own real property in Missouri and whose property taxes are affected by the purported distinction between "residential property" and "utility, industrial, commercial, and railroad property" set forth below.

4. Plaintiffs Keith E. Mattern and Carol S. Mattern are the owners of residential real property located at 14005 Clairette Lane, Town and Country, St. Louis County, Missouri. Plaintiffs Keith E. Mattern and Carole S. Mattern are, have been, and will be assessed real property taxes on said residential real property and have paid, and will pay, said taxes. Said real property has been reassessed for purposes of taxation by St. Louis County.

5. Plaintiffs Kenneth D. Ramsey and Judy E. Ramsey are the owners of residential real property located at 7100 Wayles Drive, Barnhart, Jefferson County, Missouri. Plaintiffs Kenneth D. Ramsey and Judy E. Ramsey are, have been, and will be assessed real property taxes on said residential real property and have paid, and will pay, said taxes. Said real property has been reassessed for purposes of taxation by Jefferson County.

6. Plaintiffs Robert E. Lueders and Dorothy J. Lueders are the owners of residential real property located at 8951 Red Oak Drive, Crestwood, St. Louis County, Missouri. Plaintiffs Robert E. Lueders and Dorothy J. Lueders are, have been, and will be assessed real property taxes on said residential real property and have paid, and will pay, said taxes. Said real property has been reassessed for purposes of taxation by St. Louis County.

7. Plaintiffs Wayne D. Ortloff and Fredreka Ortloff reside at Route 4, Box 303A, Neosho, Missouri, and are the owners of 754 acres of agricultural real property located in Newton County, Missouri, and 157 acres of agricultural real property located in McDonald County, Missouri. Plaintiffs Wayne D.

Ortloff and Fredreka Ortloff are, have been and will be assessed real property taxes on said agricultural real property and have paid, and will pay, said taxes. Said real property has been reassessed for purposes of taxation by Newton County and McDonald County.

8. Plaintiffs Glenn W. Stahl and Blanche B. Stahl are the owners of 73 acres of agricultural real property located in Johnson County, Missouri, approximately three miles south of Kingsville, Missouri. Plaintiffs Glenn W. Stahl and Blanche B. Stahl are, have been, and will be assessed real property taxes on said agricultural real property and have paid, and will pay, said taxes. Said real property has been reassessed for purposes of taxation by Johnson County.

9. Plaintiff Centrifugal and Mechanical Industries, Inc., is a Missouri corporation in the business of manufacturing centrifugal dryers for the coal industry, with its principal office located at 146 President Street, St. Louis, Missouri. Plaintiff Centrifugal and Mechanical Industries, Inc., is the owner of real property within the subclass of "utility, industrial, commercial and railroad property" in the City of St. Louis, Missouri. Plaintiff Centrifugal and Mechanical Industries, Inc., is, has been, and will be assessed real property taxes on its said real property and has paid, and will pay, said taxes. Said real property has been reassessed for purposes of taxation by the City of St. Louis.

10. Plaintiff The Hesse Corporation is a Delaware corporation authorized to do business in Missouri which is engaged in the manufacture of truck bodies. Plaintiff The Hesse Corporation maintains its Missouri office at 6700 St. John Avenue, Kansas City, Jackson County, Missouri. Plaintiff The Hesse Corporation is the owner of real property within the subclass of "utility, industrial, commercial and railroad property" in Jackson County, Missouri. Plaintiff The Hesse Corporation is, has been, and will be assessed real property taxes on its said real property and has paid, and will pay taxes. Said real property has been reassessed for purposes of taxation by Jackson County, Missouri.

11. Plaintiff Loretta S. Kernebeck is a resident of St. Louis County, State of Missouri; she also is a lessee of an apartment complex containing more than four (4) dwelling units. Plaintiff Kernebeck's lease contains a clause that obligates her to pay a proportionate share of tax increases. Plaintiff has been advised by the lessor that the lessor's complex is being treated as "subclass 3" property and that her rent will be increased in order to cover the increased taxes projected by the St. Louis County Assessor in his "impact notice."

12. Plaintiff Irving C. Rubin is a resident of Johnson County, Kansas, but he is the owner of twenty-six (26) units located in the County of Jackson, State of Missouri. The plaintiff has been informed by the Jackson County Assessor that his units are being classified as "subclass 3" property with an assessment ratio of 32 percent.

13. Defendant Missouri State Tax Commission is, and at all times mentioned herein was, the agency of the State of Missouri authorized and empowered by law, including without limitation § 138,380, RSMo 1978, to oversee generally the assessment of all property in the State of Missouri for purposes of taxation.

14. Defendants, Ralph N. Smith, substituting for Samuel E. Jones, Van E. Donley, and Robert E. Coleman are the chairman and members, respectively, of defendant Missouri State Tax Commission and are, and at all times mentioned herein were, authorized, empowered and required by law, including without limitation § 138.380, RSMo 1978, to carry out the functions and duties of defendant Missouri State Tax Commission. Defendants Jones, Donley, and Coleman are made defendants herein in their official capacities and not in their individual capacities.

15. Defendant State of Missouri is the sovereign power over defendant Missouri State Tax Commission and defendants Jones, Donley, and Coleman in their official capacities.

16. Defendants Missouri Merchants and Manufacturers Association, Inc., is a not-for-profit Missouri corporation

whose Motion to Intervene in this action was granted on June 17, 1985.

17. On August 3, 1982, Missouri voters approved certain amendments to the Missouri Constitution that affected the taxing power of defendant State of Missouri. Among the amendments so approved was an amendment to Mo. Const. art. X, § 4(b).

18. As so amended, Mo. Const. art. X, § 4(b) provides for three subclasses of real property as follows:

> (1) Residential property;
>
> (2) Agricultural and horticultural property;
>
> (3) Utility, industrial, commercial, railroad, and all other property not included in subclasses (1) and (2). . .

19. As so amended, Mo. Const. art. X, § 4(b) further provides that real property in these subclasses "may be defined by law" but that real property in these subclasses "shall not be further divided." In addition, as so amended this section provides that "same percentages of value shall be applied to all properties within any subclass."

20. On or about July 8, 1983, Governor Christopher Bond signed into law Conference Committee Substitute for House Committee Substitute for Senate Committee Substitute for Senate Bills 33, 60, 48, 65, and 71, which had been truly agreed to and finally passed by the General Assembly and which, among other things, defined real property in the subclasses mentioned above. The definitional section was designated as § 137.016, RSMo Supp. 1983, and became effective ninety days following adjournment of the General Assembly. This definitional section is presently codified as § 137.016, RSMo Cu. Supp. 1984.

21. Section 137.016(1), RSMo Cum. Supp. 1984, defines "residential property" in relevant part as "all real property improved by a structure which is used or intended to be used for residential living by human occupants and which contains not more than four dwelling units."

22. Section 137.016(2), RSMo Cum. Supp. 1984, defines "agricultural and horticultural property" as follows:

> [All] real property used for agricultural purposes and devoted primarily to the raising and harvesting of crops; to the feeding, breeding and management of livestock; to dairying, or to any other agricultural or horticultural use of combination thereof; and buildings and structures customarily associated with farming, agricultural, and horticultural uses. Agricultural and horticultural property shall also include land devoted to and qualifying for payments or other compensation under a soil conservation or agricultural assistance program under an agreement with an agency of the federal government. Real property classified as forest croplands shall not be agricultural or horticultural property so long as it is classified as forest croplands and shall be taxed in accordance with the laws enacted to implement section 7 of article X of the Missouri Constitution . . .

23. Section 137.016(3), RSMo Cum. Supp. 1984, defines "utility, industrial, commercial, and railroad property" in relevant part as:

> [A]ll other real property not included in the property listed in subclasses (1) and (2) of subsection 4(b) of article X of the Missouri Constitution, as such property is defined in this section . . .

24. Pursuant to these definitions contained in § 137.016, RSMo Cum. Supp. 1984, real property improved by structures containing four or fewer "dwelling units," as that term is used in that section, is deemed to be "residential property," and real property improved by structures containing more than four such dwelling units is deemed to be within the class of "utility, industrial, commercial, and railroad property."

25. On or about January 31, 1985, the Missouri General Assembly truly agreed to and finally passed Senate Bill 234, which contained provisions for the assessment percentages and ratios for real property. This bill contained an emergency clause and became effective upon signing by Governor John Ashcroft. Said bill set the assessment ratio for "residential

property" at 19 percent and that for "utility, industrial, commercial, and railroad property" at 32 percent. Said assessment ratios are currently in effect.

26. As a result of the assessment percentages and ratios contained in Senate Bill 234, real property improved by structures containing four or fewer "dwelling units," as that term is used in § 137.016, RSMo Cu. Supp. 1984, is assessed at 19 percent of its actual valuation, while real property improved by structures containing more than four such "dwelling units" is assessed at 32 percent.

CONCLUSIONS OF LAW

1. This Court has jurisdiction to hear and determine this controversy pursuant to the Declaratory Judgment Act, § 527.010.130, RSMo 1978 & Cum. Supp. 1984, and in particular § 527.020.

2. Section 137.016, which purports to distinguish for tax purposes between real property "improved by a structure which is used or intended to be used for residential living by human occupants and which contains not more than four dwelling units" and all other such real property containing more than four "dwelling units" violates the equal protection clause of U.S. Const. Amend. XIV. The distinction that it makes between property containing four or fewer dwelling units and more than four dwelling units is not "reasonably related" to any purpose of the law. *Southwestern Bell Telephone Co.* v. *Morris*, 345 S.W.2d 62, 68 (Mo. banc 1961). Classification for tax purposes

> must include all persons or objects naturally falling within a class. Constitutional class taxation must include within the established class all who belong in it and must exclude all who do not belong in it. All in each natural class must be taxed or exempted alike. A natural class may not be split.

State ex rel. Transport Manufacturing & Equipment Co. v. *Bates*, 359 Mo. 1002, 224 S.W.2d 996, 100 (banc 1949). See *Allied Stores* v. *Bowers*, 358 U.S. 522, 526-27 (1959); *City of*

Cape Girardeau v. *Fred A. Groves Motor Co.*, 346 Mo. 762 142 S.W.2d 1040, 1045 (1940). Any distinction between classes for tax purposes must be substantial." *Airway Drive-In Theatre Co.* v. *City of St. Ann*, 354 S.W.2d 858, 860 (Mo. banc 1962). The distinction in § 137.016 is hardly substantial; indeed, it is "palpably arbitrary." *Bates*, 224 S.W.2d at 1000. That distinction, therefore, violates the equal protection clause of U.S. Const. amend. XIV.

3. For the same reasons set forth in Paragraph 2 of these Conclusions of Law, § 137.016 violates the due process clause of U.S. Const. amend. XIV.

4. For the same reasons set forth in Paragraph 2 of these Conclusions of Law, § 137.016 violates the uniformity clause of Mo. Const. art. X, § 3.

5. Section 137.016 in addition violates the provisions of Mo. Const. art. X, § 4(b), that provides that the three subclasses of real property established therein "shall not be further divided." While the General Assembly is authorized to define by law the three subclasses established in that constitutional section, it is not authorized to further divide the three subclasses. The purported definition of residential property to include that property containing four or fewer dwelling units and of commercial, etc., property to include that property containing more than four dwelling units is nothing more than a further division of a single class. All multiple dwelling unit property falls naturally within a single class, as found in Paragraphs 1-3 of these Conclusions of Law. The legislature's distinction under the guise of "definition" is, therefore, in violation of Mo. Const. art. X, § 4(b). The legislature cannot arbitrarily define one thing as another. "Statutory definitions may not be employed so as to change the nature of acts or things to which words are applied[.]" 82 C.J.S. *Statutues* § 315, at 539 (1953).

6. The numerous statutes and regulations cited in suggestions by Intervenor Missouri Merchants and Manufacturers Association to demonstrate that the state and federal governments have distinguished between four or fewer and five or

more dwelling units for purposes of liens, interest, home mortgages, income taxation, and fair housing, as well as for some other purposes, are irrelevant to resolution of the issue presented in this case. "Without refering to them specifically, it is sufficient to observe that these sections appear in other chapters relating to different subjects and are not definitions adopted by the General Assembly to specify what shall constitute real property for purposes of [real property] taxation." *Iron County* v. *State Tax Commission*, 437 S.W.2d 665, 671 (Mo. banc 1968). Use of the distinctions embodied in these statutes and regulations, which do not concern classification for purposes of real property taxation, was not prohibited by the provisions in Mo. Const. art. X, § 4(b), proscribing further division for tax purposes of the constitutionally established subclasses of real property. Hence these statutes and regulations are not *in pari materia* with § 137.016, and they have no bearing on the issue here.

7. Pursuant to § 1.140 RSMo 1985, the words "and which contains not more than four dwelling units" provided in § 137.106 are severable.

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the words "and which contains not more than four dwelling units," which purport to distinguish between real property containing four or fewer dwelling units and real property containing more than four dwelling units are severed from Section 137.016.1(1), RSMo Supp. 1984, and are declared unconstitutional under the equal protection and due process clause of U.S. Const. amend. XIV and the uniformity clause of Mo. Const. art. X, section 3, and Mo. Const. art X, § 4(b).

IT IS FURTHER ORDERED, ADJUDGED and DECREED that judgment be entered in favor of plaintiffs F. George Albertus, et al. and against defendants The State Tax Commission, Sam Jones, et al. and The State of Missouri; judgment also be entered in favor of plaintiffs Associated

Industries, et al. and against said defendants insofar as said plaintiffs request the same relief requested by the Albertus plaintiffs, but not as to any further declaration concerning § 137.016, RSMo Supp. 1984.

Costs to be taken from deposit.

SO ORDERED this 12 day of September, 1986.

/s/ _____

A.J. SEIER Special Judge

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourteenth Amendment, United States Constitution:

> . . . nor shall any State deprive any person of . . . property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article X, Section 4(b), Missouri Constitution:

> Property in classes 1 [real property] and 2 [tangible personal property] and subclasses of those classes, shall be assessed for tax purposes at its value or such percentage of its true value as may be fixed by law for each class and for each subclass. . . . Property in class 1 shall be subclassed in the following classifications:
>
> (1) Residential property;
>
> (2) Agricultural and horticultural property;
>
> (3) Utility, industrial, commercial, railroad, and all other property not included in subclasses (1) and (2) of class 1.
>
> Property in the subclasses of class 1 may be defined by law, however subclasses (1), (2), and (3) shall not be further divided, provided, land in subclass (2) may by general law be assessed for tax purposes on its productive capability. The same percentage of value shall be applied to all properties within any subclass. No classes or subclass shall have a percentage of its true value in money in excess of thirty-three and one-third percent.

Article X, Section 6, Missouri Constitution:

> 1. . . . all personal property held as industrial inventories, including raw materials, work in progress and finished work on hand, by manufacturers and refiners, and all personal property held as goods, wares, merchandise, stock in trade or inventory for resale by distributors, wholesalers, or retail merchants or establishments shall be exempt from taxation; . . . The provisions of this sec-

tion exempting certain personal property of manufacturers, refiners, distributors, wholesalers, and retail merchants and establishments from taxation shall become effective, unless otherwise provided by law, in each county on January 1 of the year in which that county completes its first general reassessment as defined by law.

2. All revenues lost because of the exemption of certain personal property of manufacturers, refiners, distributors, wholesalers, and retail merchants and establishments shall be replaced to each taxing authority within a county from a countywide tax hereby imposed on all property in subclass 3 of class 1 in each county. For the year in which the exemption becomes effective, the county clerk shall calculate the total revenue lost by all taxing authorities in the county and extend upon all property in subclass 3 of class 1 within the county, a tax at the rate necessary to produce that amount. The rate of tax levied in each county according to this subsection shall not be increased above the rate first imposed and will stand levied at that rate unless later reduced according to the provisions of subsection 3. The county collector shall disburse the proceeds according to the revenue lost by each taxing authority because of the exemption of such property in that county. Restitution of the revenues lost by any taxing district contained in more than one county shall be from the several counties according to the revenue lost because of the exemption of property in each county. . . .

4. As used in this section, the terms "*revenues lost*" and "*lost revenues*" shall mean that revenue which each taxing authority received from the imposition of a tangible personal property tax on all personal property held as industrial inventories, including raw materials, work in progress and finished work on hand, by manufacturers and refiners, and all personal property held as goods, wares, merchandise, stock in trade or inventory for resale by distributors, wholesalers, or retail merchants or establishments in the last full tax year immediately preceding the effective date of the exemption from taxation granted for such property under subsection 1 of this section, and which was no longer received after such exemption became effective.

Section 137.016.1, Revised Statutes of Missouri (1986):

As used in section 4(b) of article X of the Missouri Constitution, the following terms mean:

(1) *"Residential property"*, all real property improved by a structure which is used or intended to be used for residential living by human occupants and which contains not more than four dwelling units or which contains single dwelling units owned as a condominium or in a cooperative housing association. . . . vacant land in connection with an airport, and land used as a golf course shall be classified as residential property;

. . . .

(3) *"Utility, industrial, commercial, and railroad property"*, all real property of every kind used directly or indirectly, or held for use, for any commercial, mining, industrial, manufacturing, trade, professional, business, or similar purpose, including all property centrally assessed by the state tax commission. Except as may be determined pursuant to subsection 3 or 4 of this section, all other real property not included in the property listed in subclasses (1) and (2) of section 4(b) of article X of the Missouri Constitution, as such property is defined in this section, shall be deemed to be included in the term "utility, industrial, commercial and railroad property".

Section 137.115.5., Revised Statutes of Missouri (1986):

For all tax years ending prior to January 1, 1985, all real property shall be assessed at thirty-three and one-third percent of its true value in money. For each tax year beginning on or after January 1, 1985, all subclasses of real property, as such subclasses are established in section 4(b) of article X of the Missouri Constitution and defined in section 137.016, shall be assessed at the following percentages of true value:

(1) For real property in subclass (1), nineteen percent;

(2) For real property in subclass (2), twelve percent; and

(3) For real property in subclass (3), thirty-two percent.

Supreme Court, U.S.
FILED
JUN 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1828

In the Supreme Court of the United States

OCTOBER TERM, 1986

F. GEORGE ALBERTUS, et al.,
Appellants,

vs.

STATE TAX COMMISSION OF MISSOURI, et al.,
Appellees.

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

MOTION TO DISMISS OR AFFIRM

WILLIAM L. WEBSTER
Attorney General
CURTIS F. THOMPSON
(Counsel of Record)
Assistant Attorney General
RICHARD L. WIELER
Assistant Attorney General
Broadway State Office Building
221 West High Street, 7th Floor
P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-8826
Attorneys for Appellees

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

208

TABLE OF CONTENTS

I. THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE 1

A. The Statute 1

B. The Proceedings Below 4

II. ARGUMENT 6

The Case Presents No Substantial Question For Review Or Decision By This Court 6

III. CONCLUSION 12

TABLE OF AUTHORITIES

Cases:

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959) 7

Application of Korzen, 380 N.E.2d 852 (Ill.App. 1978) 9

Associated Industries of Missouri, et al. v. State Tax Commission of Missouri, et al., 722 S.W.2d 916 (Mo. banc 1987) 5

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 10

Costner v. United States, 720 F.2d 539 (8th Cir. 1983) 10

Dane v. Jackson, 256 U.S. 589 (1921) 10

Hegenes v. State, 328 N.W.2d 719 (Minn. 1983) 9

Howell v. Malone, 388 So.2d 908 (Ala. 1980) 9

In re U.S. ex rel. Mo. State High School Activities Association, 682 F.2d 147 (8th Cir. 1982) 10

Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) 7

Madden v. Kentucky, 309 U.S. 83 (1940) 7

Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) 10

Pacific Express Co. v. Seibert, 142 U.S. 339 (1892) 6

Railroad Company v. Pennsylvania, 134 U.S. 232 (1890) 6

Roosevelt Properties v. Kinney, 465 N.E.2d 421 (Ohio 1984) 9

Walters v. City of St. Louis, 259 S.W.2d 377 (Mo. banc 1953), aff'd 347 U.S. 231 (1954) 6, 11

Constitutional Provisions:

United States Constitution,
Amendment XIV 4, 6, 10

Missouri Constitution:
Article X, § 4(b) 2

Statutory Provisions:

§ 137.016.1, RSMo 1986 .....*passim*

No. 86-1828

In the Supreme Court of the United States

OCTOBER TERM, 1986

F. GEORGE ALBERTUS, et al.,
Appellants,

vs.

STATE TAX COMMISSION OF MISSOURI, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

MOTION TO DISMISS OR AFFIRM

The appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Missouri on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the validity of § 137.016, RSMo 1986, particularly that section which classifies structures containing four or fewer human dwelling units as "residential" and five or more such units as "commercial" for the purpose of assessment of real property taxes. By amendment to the state constitution, the citi-

zens of Missouri established three subclassifications of real property for the purpose of assessment of real property taxes: (1) residential property; (2) agricultural property; and (3) utility, industrial, commercial and railroad property ("commercial property"). Article X, § 4(b) of the Missouri Constitution, adopted in 1982. The same amendment also permitted the legislature to define the property in the three subclasses and to fix the percentage of its value to be used for tax assessment purposes. The legislature's definition of the three subclassifications of real property is contained in § 137.016.1, RSMo 1986, which provides as follows:

> 1. As used in section 4(b) of article X of the Missouri Constitution, the following terms mean:
>
> (1) "Residential property", all real property improved by a structure which is used or intended to be used for residential living by human occupants and which contains not more than four dwelling units or which contains single dwelling units owned as a condominium or in a cooperative housing association. The term "cooperative housing association" means an association, whether incorporated or unincorporated, organized for the purpose of owning and operating residential real property in Missouri, the shareholders or members of which, by reason of their ownership of a stock or membership certificate, a proprietary lease or other evidence of membership, are entitled to occupy a dwelling unit pursuant to the terms of a proprietary lease or occupancy agreement; vacant land in connection with an airport, and land used as a golf course shall be classified as residential property;
>
> (2) "Agricultural and horticultural property", all real property used for agricultural purposes and de-

voted primarily to the raising and harvesting of crops; to the feeding, breeding and management of livestock; to dairying, or to any other combination thereof; and buildings and structures customarily associated with farming, agricultural, and horticultural uses. Agricultural and horticultural property shall also include land devoted to and qualifying for payments or other compensation under a soil conservation or agricultural assistance program under an agreement with an agency of the federal government. Real property classified as forest croplands shall not be agricultural or horticultural property so long as it is classified as forest croplands and shall be taxed in accordance with the laws enacted to implement section 7 of article X of the Missouri Constitution;

(3) "Utility, industrial, commercial, and railroad property", all real property of every kind used directly or indirectly, or held for use, for any commercial, mining, industrial, manufacturing, trade, professional, business, or similar purpose, including all property centrally assessed by the state tax commission. Except as may be determined pursuant to subsection 3 or 4 of this section, all other real property not included in the property listed in subclasses (1) and (2) of section 4(b) of article X of the Missouri Constitution, as such property is defined in this section, shall be deemed to be included in the term "utility, industrial, commercial and railroad property".

Later, the legislature established the following percentages of value for assessment purposes for the subclasses of real property:

Residential property in subclass 1—19%

Agricultural and horticultural property in subclass 2—12%

Utility, industrial, commercial, railroad and all others in subclass 3—32%.

B. The Proceedings Below

On May 6, 1985, the appellants sought a declaratory judgment in the Circuit Court of Cole County, Missouri, against the State Tax Commission of Missouri and its individual members alleging, among other things, that the legislative definitions in § 137.016.1, RSMo 1986, which classified structures containing four or fewer human dwelling units as "residential" and five or more dwelling units as "commercial" violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Appellants alleged that the selection of four units as the delineation between residential and commercial property was palpably arbitrary and not rationally related to any conceivable legitimate state objective that might be served by a constitutional amendment permitting classification of real property as "residential" or "commercial."

On June 7, 1985, the Missouri Merchants and Manufacturers Association filed a motion to intervene as a party defendant in support of the statute as written.

On June 11, 1985, plaintiffs Associated Industries, Mattern, Ramsey, Lueders, Ortloff, Stahl, Centrifugal and Mechanical Industries, Inc., and the Hesse Corp. (hereinafter "Associated Industries") filed a declaratory judgment action in the Circuit Court of Cole County, Missouri, alleging, among other things, violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in that only owner-occupied real prop-

erty should be subclassed as residential and all real property rented to others should be subclassed as commercial real property.

The two cases were consolidated on August 23, 1985, and the judge assigned to the cause issued his judgment on September 12, 1986, after motions for summary judgment were filed by the appellants and by Associated Industries. Specifically, the trial judge found that the words "and which contain no more than four dwelling units" in § 137.016.1(1), RSMo 1986, resulted in a real property subclass definition which, among other things, violated the Equal Protection and Due Process Clauses of the United States Constitution.

On appeal, the Missouri Supreme Court disposed of all issues in favor of appellees and against appellants and Associated Industries. *Associated Industries of Missouri, et al. v. State Tax Commission of Missouri, et al.*, 722 S.W.2d 916 (Mo. banc 1987). In a sharply divided decision (three in the majority, one concurring, and three separate dissents), the Missouri Supreme Court found that the action of the Missouri legislature allocating rental property between "residential" and "commercial" on the basis of four or less dwelling units versus five or more was not arbitrary or unreasonable. The Missouri Supreme Court found that the selection of a definite figure, such as four, by the Missouri legislature offered the most effective means of classifying rental property into residential and commercial categories.

II

ARGUMENT

The Case Presents No Substantial Question For Review Or Decision By This Court

In their statement of jurisdiction, appellants argue that the legislative distinction between four and five rental units in § 137.016.1, RSMo 1986, cannot be sustained under the Equal Protection and Due Process Clauses of the Fourteenth Amendment because the distinction bears no rational relationship to any conceivable legitimate state object. By making the argument, appellants concede that the classification here does not involve fundamental personal rights or suspect distinctions such as race, religion or alienage.

The validity of classification and subclassification for tax purposes has been recognized throughout the twentieth century. In *Pacific Express Co. v. Seibert,* 142 U.S. 339 (1892), the taxpayer claimed that a certain tax was in violation of the Equal Protection Clause of the Fourteenth Amendment. This Court held that the Fourteenth Amendment "does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation, and another kind of property to a different rate" and then went on to state that the Fourteenth Amendment was not intended to compel the state to adopt "an iron rule of equal taxation." *Id.* at 351-352. *See also, Railroad Company v. Pennsylvania,* 134 U.S. 232, 237 (1890).

In *Walters v. City of St. Louis,* 259 S.W.2d 377 (Mo. banc 1953), aff'd 347 U.S. 231, 237 (1954), this Court noted that equal protection does not require identity

of treatment of all persons so long as all those in the same tax classification or category are accorded equality of rights. In *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522 (1959), this Court held that the states have a very wide discretion in the laying of their taxes and that there is no iron rule of equality prohibiting the flexibility and variety that are appropriate to reasonable schemes of taxation. As the Court noted, "to hold otherwise would be to subject the essential taxing power of the state to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure." 358 U.S. at 527. In the field of taxation, this Court has made it clear that state legislatures possess the greatest freedom in classification. *Madden v. Kentucky,* 309 U.S. 83, 88 (1940); *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 359 (1973).

No one challenges the legitimacy of the state exercising its taxing power through the imposition of ad valorem taxes on real property. The constitutional challenge turns on whether the classifications created by the legislature are rationally related to the state's interest in taxation. Even the appellants concede that the proper standard of review under the Equal Protection Clause and the Due Process Clause is that the tax classifications established by the legislature have a rational basis; they cannot be palpably arbitrary. *Allied Stores of Ohio, Inc.,* 358 U.S. at 527.

The criteria used by the General Assembly in Missouri to define a residential subclassification in § 137.016.1(1), RSMo 1986, is reasonable and should be sustained. "Residential property" is defined as that property which is "used

and intended to be used for residential living by human occupants and which contains not more than four dwelling units." This definition looks to the use of the property by the owner of the property, not necessarily the tenant. The line between the number of dwelling units to be considered residential property and the number which must be considered commercial income producing property had to be drawn somewhere. Obviously, the owner of a large apartment complex is concerned about the production of income even though the tenants of that complex may regard the same structure or structures as residential. Admittedly, the line is blurred when the distinction is created between the assessment ratio applied to a four-unit apartment building and a five-unit apartment building, but that blurring does not rise to the level of a constitutional violation.

The demarcation as residential of four or fewer dwelling units is not unreasonable. This definition includes all owner-occupied single family homes; it also includes a fairly common occurrence where the owner lives in one unit of a duplex, triplex or four-plex and rents the other units. By using a four unit criteria, the legislature was able to encompass the great majority of typical owner-occupied dwellings without the administrative burden of proving owner occupancy. There may have been other ways to accomplish that end, but the means of producing a reduced tax burden to homeowners is best left to the discretion and wisdom of the legislative branch, and not to the courts.

It must be remembered that the various subclasses of real property are based upon the use to which the owner puts the property. In keeping with this, the Missouri legislature has made a determination that property with four or fewer dwelling units includes property held pre-

dominantly for use by the owner as a residence whereas dwelling units of five or more necessarily include property primarily used to generate an income stream to the owner.

The number of dwelling units has been used in other jurisdictions to support different treatment of real property. In *Hegenes v. State,* 328 N.W.2d 719 (Minn. 1983), the Minnesota Supreme Court upheld a state statute which classified residential properties of three units or less diffent from those properties with four units or more. The court found that there are obvious differences in size, management, ownership, markets, and appraisal approaches in the small units as opposed to the large residential properties. The court found that the distinction between the two classes was genuine and not fanciful and the classification was not wide of any reasonable mark. *Id.* at 722.

The use of four or fewer residential units as a dividing point was specifically approved in *Roosevelt Properties v. Kinney,* 465 N.E.2d 421 (Ohio 1984). In this case, the classification was by administrative rule. The taxpayer argued that all residential property was not being taxed uniformly since apartments of four or fewer were entitled to certain tax reduction factors while buildings with more units were not. The Ohio Supreme Court found that the larger units were held for "commercial expectations" and were utilized in a business capacity. *See also, Application of Korzen,* 380 N.E.2d 852 (Ill.App. 1978), and *Howell v. Malone,* 388 So.2d 908 (Ala. 1980).

In determining which property should be considered residential and which commercial, the Missouri General Assembly used a generally accepted distinction. Numerous state and federal statutes and regulations distinguish between properties based on the number of dwelling units. These statutes and regulations range over the topics of

liens, interest rates, mortgages, income taxation, fair housing, settlement procedures, savings and loan associations, defense housing, energy conservation, and other subjects. (See Appendix A for a list of Missouri state statutes and federal statutes and regulations which classify by reference to a number of dwelling units.)

The requirement that a classification have a rational relationship to a legitimate state interest which satisfies the Equal Protection Clause of the Fourteenth Amendment also satisfies substantive due process. Furthermore, there is no requirement under the due process clause that the amount of general revenue taxes collected must be reasonably related to the value of the services provided. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 624 (1981). The Fourteenth Amendment only prohibits imposition of tax on due process grounds when no benefits whatsoever are returned to the taxpayer or when the benefits returned are negligible; the Due Process Clause does not address alleged inequities in the scheme of taxation which do not rise to the level of governmental taking. *Dane v. Jackson*, 256 U.S. 589, 599 (1921). Appellants have not claimed lack of benefits in return for the payment of property taxes to the State of Missouri.

A classification does not offend the Constitution simply because it is not made with mathematical nicety or because in practice it results in some inequality. *In re U.S. ex rel. Mo. State High School Activities Association*, 682 F.2d 147, 152 (8th Cir. 1982). The question of where to draw the line that creates a distinction is particularly a legislative task and an unavoidable one. *Costner v. United States*, 720 F.2d 539, 541 (8th Cir. 1983). Perfection in drawing a line is neither possible nor necessary in order to retain constitutionality. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976).

One attacking a classification of the legislature bears the burden of negating any conceivable basis which might support that classification. *Walters v. City of St. Louis*, 259 S.W.2d 377, 386 (Mo. banc 1953), aff'd 347 U.S. 231 (1954). No one here has challenged the legitimacy of the State of Missouri exercising its taxing power through the imposition of ad valorem taxes on real property. As stated earlier, this Court has upheld the classification and subclassification of property for tax purposes. Appellants have attempted to create a substantial question for determination by this Court by focusing on the tenants of apartment dwellings rather than the owners. Since a tenant would consider his dwelling to be a "residence," appellants argue that the legislature in Missouri could not consider any apartment dwelling as a commercial enterprise. Assuming facts not in the record and ignoring other factors which influence the market, appellants even claim that § 137.016.1, RSMo 1986, discriminates against the poor and the homeless because the property taxes imposed on this commercial property will be passed along to the tenants. However, this diversionary tactic does not highlight a constitutional problem, as suggested by appellants, it merely reflects their unwillingness to deal with the fact that owning an apartment complex is a commercial enterprise to the owner, the taxpayer who the Missouri legislature tried to reach in § 137.016.1(1) by drawing a line to distinguish commercial property from residential property. Since appellants cannot launch a constitutional challenge against the classification of commercial as opposed to residential property for ad valorem tax purposes, they are forced to quibble over the precise location of the line drawn by the Missouri legislature. This does not rise to the level of a substantial question for review or decision by this Court.

III

CONCLUSION

WHEREFORE, appellees respectfully submit that the question upon which this cause depends is so unsubstantial as not to need further argument, and appellees respectfully move the Court dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Missouri.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General
CURTIS F. THOMPSON
(Counsel of Record)
Assistant Attorney General
Missouri Bar No. 25171
RICHARD L. WIELER
Assistant Attorney General
Missouri Bar No. 20348
Broadway State Office Building
221 West High Street, 7th Floor
P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-8826
Attorneys for Appellees

APPENDIX A

§ 137.016, RSMo 1986	Property taxes. Not more than four dwelling units.
§ 429.013, RSMo 1986	Mechanic's liens. Residential, property of four units or less.
§ 408.015(6), RSMo 1986	Interest. Real estate used or intended to be used as a residence by not more than four families.
§ 408.231.3, RSMo 1986	Second mortgage loans. Real estate used or intended to be used as a residence by not more than four families.
§ 408.570(5), RSMo 1986	Residential real estate loans. Real estate used or intended to be used as a residence by not more than four families.
§ 148.470(3), RSMo 1986	Savings and loan associations tax. Real estate upon which there is located a dwelling or dwellings for not more than four families.
12 U.S.C. § 1454(a)(2)	Federal Home Loan Mortgage Corp. One to four family dwelling units.
12 U.S.C. § 1454(a)(4)(A)(ii)	Federal Home Loan Mortgage Corp. Five or more family dwelling units.
12 U.S.C. § 1701j-3(d)	Due on sale clauses. Less than five dwelling units.
12 U.S.C. § 1709(b)(2)	Mortgage insurance. One to four family dwelling units.

12 U.S.C. § 1715e(d)	Cooperative housing insurance. Five or more family units.
12 U.S.C. § 1715l(f)	Moderate income housing. Five or more family units.
12 U.S.C. § 1715n(b),(d)	Mortgage insurance. One to four family units.
12 U.S.C. § 1715p	Open end mortgage. Dwelling designed principally for residential use for not more than four families.
12 U.S.C. § 1715z(c)(2)(A),(q)(10)(C)	Low income home ownership. Two to four family property.
12 U.S.C. § 1715Z-1(j)(5)(B)	Low income rental housing. Five or more dwelling units.
12 U.S.C. § 1715z-18(a)	Shares appreciation mortgages. Five or more family units.
12 U.S.C. § 1717(b)(5)(A),(C)	FNMA, GNMA mortgages. One to four family residence.
12 U.S.C. § 1723e(b)	FNMA, GNMA mortgages. One to four family residence.
12 U.S.C. § 1723e(b)	FNMA, GNMA mortgages. More than four family residences.
12 U.S.C. § 1723h(b)	Solar Energy Conservation Bank. One to four family dwelling units.
12 U.S.C. § 1735b(a)	Defects in mortgaged homes. One to four family dwelling units.

12 U.S.C. § 1735f-6	Secondary mortgages. One family dwelling units.
12 U.S.C. § 1745	War housing insurance. Dwelling designed principally for residential use for not more than four families.
12 U.S.C. § 1757(5) (A) (i)	Federal credit unions. One to four family dwelling units.
12 U.S.C. § 2602(1) (A)	Real estate settlement procedures. Designed principally for the occupancy of one to four families.
12 U.S.C. § 3602(2),(3)	Solar Energy Conservation Bank. Residence which does not contain more than four dwelling units.
12 U.S.C. § 3609(a)	Solar Energy Conservation Bank. One, two, three, or four dwelling units.
12 U.S.C. § 3610(a)	Solar Energy Conservation Bank. One, two, three, or four dwelling units.
15 U.S.C. § 1602(v)	Consumer credit protection (truth in lending, fair credit reporting). One to four family housing units.
26 U.S.C. § 103A(1) (9)	Internal Revenue Code. Two, three, or four family residences.
26 U.S.C. § 6323(b) (7)	Internal Revenue Code. Not more than four dwelling units.

38 U.S.C. § 1827(a)	Veterans' benefits. One to four family dwelling units.
42 U.S.C. § 1524	National defense housing. Not more than four family dwelling units.
42 U.S.C. § 1587(b),(c)	Disposal of war housing. Dwelling structure designed for occupancy by not more than four families.
42 U.S.C. § 1592a(a)	National defense housing. Not more than four families.
42 U.S.C. § 3540(a)	HUD Department. One to four family dwelling units.
42 U.S.C. § 8211(9)(B)	Residential energy conservation. At least one but not more than four dwelling units.
42 U.S.C. § 8225 (P.L. 95-619, 92 Stat. 3223)	Residential energy conservation. Not more than four dwelling units.
42 U.S.C. § 8281(b)(3)	Multifamily energy conservation. Five or more dwelling units.
12 C.F.R. § 29.1	Adjustable rate mortgages. One to four family dwelling units.
12 C.F.R. § 203.2(c)	Home mortgages disclosure. Designed principally for occupancy of one to four families.
12 C.F.R. § 203.4(b)(2)	Home mortgages disclosure. One to four family dwelling units.

12 C.F.R. § 226.2(a)(19)	Truth in lending (Reg. Z). Residential structure that contains one to four dwelling units.
12 C.F.R. § 228.4(b)(2)	Community reinvestment. One to four family dwelling units.
12 C.F.R. § 338.1(f)(1)	Fair housing. One to four residential units.
12 C.F.R. § 541.14	Federal savings and loan. Dwelling units for four or fewer families.
12 C.F.R. § 203.38	Mutual mortgage insurance. Residential use for not more than four families.

Supreme Court, U.S.
FILED
JUN 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-1828

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

F. GEORGE ALBERTUS, *et al.*,
Appellants,

v.

STATE TAX COMMISSION OF MISSOURI, *et al.*,
Appellees.

On Appeal From The Supreme Court Of Missouri

APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

LAWRENCE G. CRAHAN
(Counsel of Record)
DONALD U. BEIMDIEK
THOMAS B. WEAVER
JORDAN B. CHERRICK

ARMSTRONG, TEASDALE, KRAMER,
VAUGHAN & SCHLAFLY
611 Olive Street, Suite 1900
St. Louis, Missouri 63101
(314) 621-5070
Counsel for Appellants

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS: PAGE

Missouri Constitution:

Article X, § 4(b) 2, 3, 4

CASES:

Hooper v. *Bernalillo County Assessor*, 472 U.S. 612 (1985) 3

STATUTORY PROVISIONS:

Revised Statutes of Missouri (1986):

§ 137.016.1 ..... 2, 3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1828

F. GEORGE ALBERTUS, *et al.*,
Appellants,

v.

STATE TAX COMMISSION OF MISSOURI, *et al.*,
Appellees.

On Appeal From The Supreme Court Of Missouri

APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

Reduced to its essence, the State's Motion to Dismiss or Affirm (hereinafter "Motion") would have this Court hold that if a classification based on the number of dwelling units is rational under any circumstances, it is rational in all circumstances. This is not and never has been a correct statement of the so called "rational basis" test.

As appellants have shown in their Jurisdictional Statement, the so called "rational basis" test consistently applied by this Court in analyzing equal protection challenges to classifications which do not involve "suspect" categories is in fact a two part analysis. Jurisdictional Statement, p. 8. The first step, which both the State and the Missouri Supreme Court have ignored, requires iden-

tification of what was or may have been the State's interest to be advanced by the classification and a determination of whether that interest is "legitimate." Only by identifying the legitimate state interest to be advanced by the classification can the court perform the second step and determine whether the classification is rationally related to the interest identified.

Even classifications based on factors such as age, sex and alienage may be upheld where the State can show a sufficient interest. That does not mean that such classifications are constitutional under all circumstances. That can only be determined by examining the particular state interest to be advanced by the classification. Thus, the State's laundry list of statutes establishing classifications based on the number of dwelling units is irrelevant. The fact that distinctions based on the number of dwelling units may be appropriate in other circumstances tells this Court nothing about whether it is appropriate in this instance.

Similarly, the State's cases from other state courts sustaining tax classifications based on the number of dwelling units are plainly distinguishable from this case. In none of those cased was there any constitutional provision defining and limiting the purpose to be served by the legislation. As Appellants have shown in their Jurisidictional Statement, the Missouri legislature's sole authority to enact § 137.016.1.(1) was derived from article X, § 4(b) of the Missouri Constitution, which itself establishes the only legitimate State interests to be advanced by legislation. Jurisdictional Statement, pp. 11-15. Thus, assuming *arguendo* that courts in other states have properly identified some other interests that might legitimately be advanced by classifications based on the number of dwelling units, such interests cannot be considered "legiti-

mate" in this case. The only state interests the Missouri legislature was free to pursue were those interests the people of Missouri endorsed by establishing separate residential, commercial and agricultural classifications in article X, § 4(b) of the state constitution.

Neither the State's Motion nor the opinion below make any attempt to articulate what interest the people of Missouri sought to advance by according more favorable tax treatment for residential and agricultural property. Rather, the State ignores article X, § 4(b) and seeks to justify § 137.016.1.(1) as rationally related to the State's interest in taxation generally. Motion, p. 7. This Court has never accepted such a broad, generalized interest as sufficient to support the required equal protection analysis. Moreover, if the State's general interest in taxation was deemed sufficient to support any classification increasing the tax burden on a given class, virtually any arbitrary classification would have to be upheld. The veterans in *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612 (1985), would have to be turned away because their exclusion from the class receiving favorable property tax treatment would necessarily produce more taxes for the State. The teaching of *Hooper* is to the contrary.

The State also asserts, without authority, that the subclasses of real property are based on the use to which the owner puts the property. Motion, p. 8. The Missouri Supreme Court did not adopt this construction of § 137.016 and the langauge of the statute belies such an interpretation. In § 137.016.1.(1), the legislature defined residential property in terms of the use or intended use of the property "for residential living by human occupants," not its use or intended use for residential living by the owner. In addition, property otherwise qualifying as residential property is excluded from the class based on

the composition of the structure, i.e., the number of dwelling units or presence of condominium units, not on the basis of whether it is rented or occupied by the owner. Moreover, in advancing its "owner occupancy" rationale, the State still has not articulated what legitimate state interest would be served or refuted Appellant's demonstration that § 137.016.1.(1) is incompatible with the State's previously assumed goal of encouraging home ownership. *See* Jurisdictional Statement, pp. 15-18.

The State has likewise failed to address or rebut Appellant's showing that the only likely purpose of article X, § 4(b) establishing separate classifications for residential, commercial and agricultural property was to minimize the tax burden on food and housing. *See* Jurisdictional Statement, pp. 11-15. Given this purpose, a classification based on the number of dwelling units is palpably arbitrary. Thus, contrary to the State's characterization of Appellants' position, Appellants are not quibbling over where the legislature chose to draw the line. Rather, Appellants maintain that any distinction based on the number of dwelling units cannot be considered rationally related to the State's legitimate interest of minimizing the tax burden on housing.

In sum, the State's Motion to Dismiss or Affirm suffers from precisely the same flaws as the opinion below. Neither the State nor the Missouri Supreme Court have acknowledged, let alone applied, the required equal protection analysis consistently applied by this Court. Especially in light of this Court's previous holdings requiring Appellants to seek vindication of their federal constitutional rights in state court, it now behooves this Court to exercise its supervisory appellate authority to ensure that state courts respect established precedents and accord such claims the same degree of scrutiny liti-

gants could expect in a federal forum. The question presented is substantial.

CONCLUSION

For these reasons, and for the reasons stated in the Jurisdictional Statement, this Court should note probable jurisdiction in this appeal and docket this case for argument. In the alternative, this Court should summarily reverse and remand this case to the Missouri Supreme Court with directions to determine: (1) the purpose of the classification of real property embodied in article X, § 4(b); (2) whether that purpose is legitimate; and (3) whether § 136.016.1.(1) is rationally related to that purpose.

Respectfully submitted,

LAWRENCE G. CRAHAN
(Counsel of Record)
DONALD U. BEIMDIEK
THOMAS B. WEAVER
JORDAN B. CHERRICK

ARMSTRONG, TEASDALE, KRAMER,
VAUGHAN & SCHLAFLY
611 Olive Street, Suite 1900
St. Louis, Missouri 63101
(314) 621-5070
Counsel for Appellants